

# ARKANSAS CODE OF 1987 ANNOTATED



## 2013 SUPPLEMENT VOLUME 3A

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**TITLE 5**  
**CRIMINAL OFFENSES**  
(CHAPTERS 50-79 IN VOLUME 3B)

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***SUBTITLE 1. GENERAL PROVISIONS***

**CHAPTER 1**  
**GENERAL PROVISIONS**

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SECTION.

- 5-1-110. Conduct constituting more than  
one offense — Prosecution.

**5-1-102. Definitions.**

As used in the Arkansas Criminal Code:

- (1) "Act" or "action" means the same as defined in § 5-2-201;
- (2) "Actor" includes, when appropriate, a person who possesses something or who omits to act;
- (3) "Conduct" means the same as defined in § 5-2-201;
- (4) "Deadly weapon" means:
  - (A) A firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious physical injury; or
  - (B) Anything that in the manner of its use or intended use is capable of causing death or serious physical injury;
- (5) "Element of the offense" means the conduct, the attendant circumstances, or the result of conduct that:
  - (A) Is specified in the definition of the offense;
  - (B) Establishes the kind of culpable mental state required for commission of the offense; or
  - (C) Negates an excuse or justification for the conduct;
- (6)(A) "Firearm" means any device designed, made, or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use.
  - (B) "Firearm" includes:
    - (i) A device described in subdivision (6)(A) of this section that is not loaded or lacks a clip or another component to render it immediately operable; and
    - (ii) Components that can readily be assembled into a device described in subdivision (6)(A) of this section;
- (7) "Included offense" means the same as defined in § 5-1-110(b);
- (8)(A) "Knowingly" or an equivalent term such as "knowing", "with knowledge", "willful", or "willfully" means the same as "knowingly" defined in § 5-2-202.
  - (B) However, if the statute clearly indicates a legislative intent to require a culpable mental state of "purposely", "willful" or "willfully" means the same as "purposely" defined in § 5-2-202;
- (9) "Law" includes a statute or court decision;
- (10) "Law enforcement officer" means any public servant vested by law with a duty to maintain public order or to make an arrest for an offense;
- (11) "Negligently" or an equivalent term such as "negligence" or "with negligence" means the same as defined in § 5-2-202;
- (12) "Omission" or "omit to act" means the same as defined in § 5-2-201;
- (13)(A) "Person", "actor", "defendant", "he", "she", "her", or "him" includes:
  - (i) Any natural person; and
  - (ii) When appropriate, an "organization" as defined in § 5-2-501.
- (B)(i)(a) As used in §§ 5-10-101 — 5-10-105, "person" also includes an unborn child in utero at any stage of development.



(b) "Unborn child" means offspring of human beings from conception until birth.

(ii) This subdivision (13)(B) does not apply to:

(a) An act that causes the death of an unborn child in utero if the act was committed during a legal abortion to which the woman consented, including an abortion performed to remove an ectopic pregnancy or other nonviable pregnancy when the embryo is not going to develop further;

(b) An act that is committed pursuant to a usual and customary standard of medical practice during diagnostic testing or therapeutic treatment;

(c) An act that is committed in the course of medical research, experimental medicine, or an act deemed necessary to save the life or preserve the health of the woman;

(d) Assisted reproduction technology activity, procedure, or treatment; or

(e) An act occurring before transfer to the uterus of the woman of an embryo created through in vitro fertilization.

(iii) Nothing in this subdivision (13)(B) shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero;

(14) "Physical injury" means the:

(A) Impairment of physical condition;

(B) Infliction of substantial pain; or

(C) Infliction of bruising, swelling, or a visible mark associated with physical trauma;

(15) "Possess" means to exercise actual dominion, control, or management over a tangible object;

(16) "Public servant" means any:

(A) Officer or employee of this state or of any political subdivision of this state;

(B) Person exercising a function of any officer or employee of this state or any political subdivision of this state;

(C)(i) Person acting as an adviser, consultant, or otherwise in performing any governmental function.

(ii) However, this subdivision (16)(C) does not include a witness; or

(D) Person elected, appointed, or otherwise designated to become a public servant although not yet occupying that position;

(17) "Purposely" or an equivalent term such as "purpose", "with purpose", "intentional", "intentionally", "intended", or "with intent to" means the same as "purposely" as defined in § 5-2-202;

(18) "Reasonably believes" or "reasonable belief" means a belief:

(A) That an ordinary and prudent person would form under the circumstances in question; and

(B) Not recklessly or negligently formed;

(19) "Sawed-off or short-barreled rifle" means:

(A) A rifle having one (1) or more barrels less than sixteen inches (16") in length; or

(B) Any weapon made from a rifle, whether by alteration, modification, or otherwise, if the weapon, as modified, has an overall length of less than twenty-six inches (26");

(20) "Sawed-off or short-barreled shotgun" means:

(A) A shotgun having one (1) or more barrels less than eighteen inches (18") in length; or

(B) Any weapon made from a shotgun, whether by alteration, modification, or otherwise, if the weapon, as modified, has an overall length of less than twenty-six inches (26");

(21) "Serious physical injury" means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ; and

(22) "Statute" includes the Arkansas Constitution and any statute of this state, any ordinance of a political subdivision of this state, and any rule or regulation lawfully adopted by an agency of this state.

**History.** Acts 1975, No. 280, § 115; A.S.A. 1947, § 41-115; Acts 1994 (2nd Ex. Sess.), No. 45, § 2; 1999, No. 1273, §§ 1-3; 1999, No. 1476, § 1; 2005, No. 1994, § 442; 2007, No. 827, § 11; 2013, No. 1032, § 1.

**Amendments.** The 2013 amendment

substituted "offspring of human beings from conception to birth" for "a living fetus of twelve (12) weeks or greater gestation" in (13)(B)(i)(b); added the ending to in (13)(B)(ii)(a) beginning "including an abortion"; and added (13)(B)(ii)(d) and (13)(B)(ii)(e).

## CASE NOTES

### ANALYSIS

Element of Offense.

Person.

Physical Injury.

Possess.

Reasonable Belief.

Serious Physical Injury.

### Element of Offense.

Because defendant presented evidence arguably supporting self defense or a justification defense to a charge of aggravated assault under Arkansas law, the government had to negate that defense by a preponderance of the evidence for an enhancement for using the firearm in connection with another felony offense under U.S. Sentencing Guidelines Manual § 2K2.1(b)(5) [now (b)(6)] (2005), to apply because whether circumstances negated defendant's excuse or justification was an element of the offense under subdivision (5)(C) of this section, which had to be proved by the state under § 5-1-111(a)(1), and the definition of aggravated assault expressly excluded any person acting in

self-defense or the defense of a third party under § 5-13-204(c)(2). *United States v. Raglin*, 500 F.3d 675 (8th Cir. 2007).

### Person.

District court concluded that the Arkansas Supreme Court would extend its decision in *Aka*, which held that wrongful death suits could be brought on behalf of unborn, viable fetuses, to allow a negligence suit to be filed on a child's behalf, seeking to recover for alleged negligently inflicted injuries that the child sustained in utero. The district court noted that the state supreme court had found persuasive the state legislature's decision to expand the definition of "person" in the homicide and probate laws, subdivision (13)(B)(i)(b) of this section, § 28-1-118(a), to include viable fetuses, thereby giving statutory protection to unborn children, and that it would be absurd to think that less protection would be provided under Arkansas law to children who suffered in utero injury, but nevertheless managed to be born. *Crussell v. Electrolux Home Prods.*, 499 F. Supp. 2d 1137 (W.D. Ark. 2007).



### **Physical Injury.**

Defendant's suspended sentence was properly revoked under § 5-4-309(d), where the state proved that defendant committed third-degree domestic battery under § 5-26-305(a), by showing that defendant inflicted physical injury under subdivision (14) of this section by pulling his wife's hair and throwing her against a vehicle. *Andrews v. State*, 2009 Ark. App. 624, — S.W.3d — (2009).

During a hearing on the state's petition to revoke a defendant's suspended sentence, defendant admitted that he slapped his pregnant wife and a responding officer testified to a personal observation of the swollen knot on the wife's cheek and knot over the wife's right eye from being hit; this evidence was sufficient to find that defendant inexcusably violated a condition of that suspension and that defendant had committed the offense of domestic battery in the third degree. *May v. State*, 2009 Ark. App. 703, — S.W.3d — (2009).

Teacher's testimony alone was sufficient evidence of physical injury to support defendant juvenile's adjudication for second degree in violation of § 5-13-202 for striking the teacher in the arm because the teacher testified that after appellant hit her, the pain she suffered in her arm was of a sufficient nature to cause her to seek medical treatment, and she also testified that her arm was "very sore" for at least a week; while medical treatment is not required in order to establish a physical injury, the fact the pain was of a sufficient nature to cause the victim to seek medical care constitutes evidence that she experienced "substantial pain." *M. T. v. State*, 2009 Ark. App. 761, 350 S.W.3d 792 (2009).

Revocation of defendant's suspended imposition of sentence for two felony convictions was appropriate because the circuit court's finding that she committed third-degree domestic battering and thus violated the condition that she break no laws, was not clearly against the preponderance of the evidence. The testimony was sufficient to prove that, either purposefully or recklessly, she struck her nephew and caused him physical injury in the form of substantial pain under § 5-26-305(a) and subdivision (14) of this section. *Westbrook v. State*, 2011 Ark. App. 615, — S.W.3d — (2011).

### **Possess.**

Evidence was sufficient to support defendant's conviction of possession of drug paraphernalia with intent to manufacture because the jury could reasonably conclude that defendant constructively possessed the paraphernalia with intent to manufacture where defendant owned the property jointly with his wife, defendant was the only person in the house when the police arrived, and defendant admitted to the officers that the methamphetamine lab in the home was his. *Cantrell v. State*, 2009 Ark. 456, 343 S.W.3d 591 (2009).

When a rape victim testified at defendant's probation revocation hearing that he had a gun at the time of the rape, that testimony was sufficient for the court to find that he had possessed a firearm within the meaning of § 5-73-103(a)(1) and subdivision (15) of this section. *Craig v. State*, 2010 Ark. App. 309, — S.W.3d — (2010).

Evidence that there was a funnel, plastic tubing, coffee filters, camp fuel, syringes, gloves, a metal spoon, a smoking device, a bag of ammonia nitrate, and a pill crusher in the master bedroom of defendant's home, along with a burn barrel in the back yard, was sufficient to support a conviction for possession of paraphernalia with intent to manufacture. *Gowen v. State*, 2011 Ark. App. 761, 387 S.W.3d 230 (2011).

### **Reasonable Belief.**

Because a juvenile's father had not resorted to use of a deadly weapon during an argument, because there had been an interlude of approximately five minutes since their last confrontation, because the father, at the time he was struck, had turned away from the juvenile, and because the juvenile did not testify as to whether the juvenile's beliefs were reasonable, the juvenile lacked justification under subdivision (18) of this section and §§ 5-2-606(a)(1), 5-2-607(a)(1), (2), and was properly adjudicated as a delinquent for second-degree domestic battering. *D.W. v. State*, 2011 Ark. App. 187, — S.W.3d — (2011).

### **Serious Physical Injury.**

Evidence was sufficient to show that defendant acted "under circumstances manifesting extreme indifference to the value of human life" and to sustain his

conviction for first degree battery because defendant admittedly placed a child in a tub of water so hot that it severed the skin from his feet, and defendant's own statements, although inconsistent, supported the conclusion that he knew that it was his responsibility to properly supervise the child during a bath and to ensure a safe water temperature and that he consciously disregarded the risks involved. *Bell v. State*, 99 Ark. App. 300, 259 S.W.3d 472 (2007).

Where defendant stepped out of his motel room and fired a .45 caliber semiautomatic pistol through the windshield of a nearby car, striking all three occupants and killing two of them, the evidence was sufficient to support defendant's conviction of committing a terroristic act under § 5-13-310(a)(1)(A) and (B) as to the third victim because the evidence established that the third victim was shot in the foot, and the court rejected defendant's argument that the evidence was insufficient for failing to establish that the victim suffered a "serious physical injury" as that term is defined in subdivision (21) of this section. The evidence was sufficient to establish that the victim suffered a serious physical injury because the victim suffered a gunshot wound from a .45 caliber semiautomatic pistol that was serious enough to warrant emergency medical care, the victim continued to experience pain and tenderness while walking and was often unable to wear shoes due to the lasting effects of the wound, and the vic-

tim was unable to participate in activities that he enjoyed before sustaining the injury, such as playing basketball, and had visible scarring from the entry and exit of the bullet; this evidence was sufficient to support the jury's factual finding that the victim suffered a serious physical injury as a result of defendant's actions. *Butler v. State*, 2009 Ark. App. 695, 371 S.W.3d 699 (2009).

Defendant's conviction for aggravated assault was proper because there was evidence that defendant's conduct created a substantial risk of serious physical injury, as defined in subdivision (21) of this section; defendant hit the victim with the butt of a pistol with sufficient force to knock the victim down, breaking facial bones and causing the victim's eye to swell shut. *Pitts v. State*, 2012 Ark. App. 228, — S.W.3d — (2012).

During parents' trial for first-degree battery against their infant, the court did not err in refusing to instruct the jury on the lesser-included offense of third-degree battery because the physical injury the infant sustained could only be described as serious under subdivision (21) of this section; the infant was severely malnourished to the point of starvation and death would have occurred within days without medical attention. *Bruner v. State*, 2013 Ark. 68, — S.W.3d — (2013).

**Cited:** *Kale v. Ark. State Med. Bd.*, 367 Ark. 151, 238 S.W.3d 89 (2006); *Autrand v. State*, 2010 Ark. App. 245, — S.W.3d — (2010).

## 5-1-103. Applicability to offenses generally.

### CASE NOTES

**Cited:** *Ark. Dep't of Corr. v. Williams*, 2009 Ark. 523, 357 S.W.3d 867 (2009).

## 5-1-104. Territorial applicability.

### CASE NOTES

#### **Jurisdiction.**

Arkansas trial court had jurisdiction over defendant, a Georgia resident, during his trial for theft of property and computer fraud where defendant caused the victim, an Arkansas resident, to access

her computer by virtue of his email correspondence for the purpose of obtaining money with a false or fraudulent intent, representation, or promise. *Powell v. State*, 97 Ark. App. 239, 246 S.W.3d 891 (2007).



## 5-1-107. Misdemeanors.

### CASE NOTES

#### Jurisdiction.

According to the plain language of subsection (a) of this section, because a violation of any Arkansas Game and Fish Commission (AGFC) regulation carried a penalty that could include imprisonment but was not designated a felony, the act of

violating an AGFC regulation was a misdemeanor; therefore, while the Bickerstaff case set forth a holding that the only penalty for violating the AGFC regulation was a fine, that was an incorrect statement of the law. *State v. Herndon*, 365 Ark. 185, 226 S.W.3d 771 (2006).

## 5-1-108. Violations.

### CASE NOTES

**Cited:** *State v. Herndon*, 365 Ark. 185, 226 S.W.3d 771 (2006); *Williams v. State*, 2009 Ark. App. 554, — S.W.3d — (2009).

## 5-1-109. Statute of limitations.

(a)(1) A prosecution for the following offenses may be commenced at any time:

- (A) Capital murder, § 5-10-101;
- (B) Murder in the first degree, § 5-10-102;
- (C) Murder in the second degree, § 5-10-103;
- (D) Rape, § 5-14-103, if the victim was a minor at the time of the offense;
- (E) Sexual indecency with a child, § 5-14-110;
- (F) Sexual assault in the first degree, § 5-14-124;
- (G) Sexual assault in the second degree, § 5-14-125, if the victim was a minor at the time of the offense;
- (H) Incest, § 5-26-202, if the victim was a minor at the time of the offense;
- (I) Engaging children in sexually explicit conduct for use in visual or print medium, § 5-27-303;
- (J) Transportation of minors for prohibited sexual conduct, § 5-27-305;
- (K) Employing or consenting to the use of a child in a sexual performance, § 5-27-402;
- (L) Producing, directing, or promoting a sexual performance by a child, § 5-27-403; and
- (M) Computer exploitation of a child in the first degree, § 5-27-605.

(2) A prosecution may be commenced for a violation of the following offenses, if, when the alleged violation occurred, the offense was committed against a minor, the violation has not been previously reported to a law enforcement agency or prosecuting attorney, and the victim has not reached the age of twenty-eight (28) years of age:

- (A) Sexual assault in the third degree, § 5-14-126;

(B) Sexual assault in the fourth degree, § 5-14-127;

(C) Endangering the welfare of a minor in the first degree, § 5-27-205;

(D) Permitting abuse of a minor, § 5-27-221; and

(E) Computer child pornography, § 5-27-603.

(b) Except as otherwise provided in this section, a prosecution for another offense shall be commenced within the following periods of limitation after the offense's commission:

(1)(A) Class Y felony or Class A felony, six (6) years.

(B) However, for rape, § 5-14-103, the period of limitation is eliminated if biological evidence of the alleged perpetrator is identified that is capable of producing a deoxyribonucleic acid (DNA) profile;

(2) Class B felony, Class C felony, Class D felony, or an unclassified felony, three (3) years;

(3)(A) Misdemeanor or violation, one (1) year.

(B) However, for failure to notify by a mandated reporter in the first degree, § 12-18-201, and failure to notify by a mandated reporter in the second degree, § 12-18-202, the period of limitation is ten (10) years after the child victim reaches eighteen (18) years of age if the child in question was subject to child maltreatment; and

(4) Municipal ordinance violation, one (1) year unless a different period of time not to exceed three (3) years is set by ordinance of the municipal government.

(c) If the period prescribed in subsection (b) of this section has expired, a prosecution may nevertheless be commenced for:

(1) Any offense involving either fraud or breach of a fiduciary obligation, within one (1) year after the offense is discovered or should reasonably have been discovered by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself or herself not a party to the offense; and

(2)(A) Any offense that is concealed involving felonious conduct in office by a public servant at any time within five (5) years after he or she leaves public office or employment or within five (5) years after the offense is discovered or should reasonably have been discovered, whichever is sooner.

(B) However, in no event does this subdivision (c)(2) extend the period of limitation by more than ten (10) years after the commission of the offense.

(d) A defendant may be convicted of any offense included in the offense charged, notwithstanding that the period of limitation has expired for the included offense, if as to the offense charged the period of limitation has not expired or there is no period of limitation, and there is sufficient evidence to sustain a conviction for the offense charged.

(e)(1) For the purposes of this section, an offense is committed either when:

(A) Every element occurs; or

(B) If a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time the course of conduct or the defendant's complicity in the course of conduct is terminated.

(2) Time starts to run on the day after the offense is committed.

(f) A prosecution is commenced when an arrest warrant or other process is issued based on an indictment, information, or other charging instrument if the arrest warrant or other process is sought to be executed without unreasonable delay.

(g) The period of limitation does not run:

(1)(A) During any time when the accused is continually absent from the state or has no reasonably ascertainable place of abode or work within the state.

(B) However, in no event does this subdivision (g)(1) extend the period of limitation otherwise applicable by more than three (3) years; or

(2) During any period when a prosecution against the accused for the same conduct is pending in this state.

(h) If the period prescribed in subsection (b) of this section has expired, a prosecution may nevertheless be commenced for a violation of the following offenses if, when the alleged violation occurred, the offense was committed against a minor, the violation has not previously been reported to a law enforcement agency or prosecuting attorney, and the period prescribed in subsection (b) of this section has not expired since the victim has reached eighteen (18) years of age:

(1) Battery in the first degree, § 5-13-201;

(2) Battery in the second degree, § 5-13-202;

(3) Aggravated assault, § 5-13-204;

(4) Terroristic threatening in the first degree, § 5-13-301;

(5) Kidnapping, § 5-11-102;

(6) False imprisonment in the first degree, § 5-11-103;

(7) Permanent detention or restraint, § 5-11-106; and

(8) Criminal attempt, criminal solicitation, or criminal conspiracy to commit any offense listed in this subsection, §§ 5-3-201, 5-3-202, 5-3-301, and 5-3-401.

(i) If there is biological evidence connecting a person with the commission of an offense and that person's identity is unknown, the prosecution is commenced if an indictment or information is filed against the unknown person and the indictment contains the genetic information of the unknown person and the genetic information is accepted to be likely to be applicable only to the unknown person.

(j) When deoxyribonucleic acid (DNA) testing implicates a person previously identified through a search of the State DNA Data Base or National DNA Index System, a statute of limitation shall not preclude prosecution of the offense.

**History.** Acts 1975, No. 280, § 104; § 1; 2001, No. 920, § 1; 2001, No. 1780, 1981, No. 620, § 1; A.S.A. 1947, § 41-104; § 2; 2003, No. 1087, § 8; 2003, No. 1390, Acts 1987, No. 484, § 1; 1987, No. 586, § 1; 2005, No. 2250, § 1; 2009, No. 1444,



§ 1; 2011, No. 698, § 1; 2011, No. 1127, §§ 1, 2; 2013, No. 144, § 1; 2013, No. 1086, § 1.

**Amendments.** The 2009 amendment rewrote (b)(1)(B); substituted “§ 5-27-221” for “§ 5-27-221(a)(1) and (3)” in (h)(15); and rewrote (j).

The 2011 amendment by No. 698 inserted present (b)(4).

The 2011 amendment by No. 1127 added (a)(2); and deleted former (h)(8)

through (h)(21) and redesignated the remaining subdivisions accordingly.

The 2013 amendment by No. 144 rewrote (a)(1); deleted former (a)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(F), (a)(2)(I) and (a)(2)(N) and redesignated the remaining subsections accordingly.

The 2013 amendment by No. 1086 added (b)(3)(B).

## CASE NOTES

### ANALYSIS

Authority of Court.

Commencement of Prosecution.

Continuing Crime.

Evidence.

Tolling the Statute.

### Authority of Court.

Inmate's appeal from the denial of his petition for a writ of habeas corpus was dismissed as the inmate could not state grounds on which to maintain his petition; appellate court rejected inmate's claim that the trial court did not have jurisdiction to charge him for the underlying conviction of rape of a person less than fourteen years old because inmate was charged within five years of the victim's 18th birthday and, therefore, was within the statute of limitations set forth in subdivisions (b)(1) and (h) of this section. *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006).

### Commencement of Prosecution.

Subdivision (c)(1) of this section permitted prosecution of defendant for thefts of property that occurred outside the three-year statute of limitations because defendant committed fraud by using her position handling the payroll for her employer to steal tens of thousands of dollars and the fraud was discovered less than one year before the criminal proceedings were initiated. *Leek v. State*, 2012 Ark. App. 699, — S.W.3d —, 2012 Ark. App. LEXIS 828 (Dec. 12, 2012).

### Continuing Crime.

Trial court did not err in denying defendant's motion to dismiss two charges for theft of property in excess of \$2,500 on the ground that the charges were barred by

the three-year statute of limitations in subdivision (b)(2) of this section because the amended information was filed within three years of the earliest unauthorized withdrawal from a client's account that was made by defendant, an attorney. *Cameron v. State*, 94 Ark. App. 58, 224 S.W.3d 559 (2006), appeal dismissed, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 496 (Sept. 27, 2007).

Trial court erred in denying a father's motion to dismiss a charge of failure to pay child support, a continuing offense, on the ground that the statute of limitations had expired because the date of the crime of nonsupport had to be determined based upon subdivision (b)(3) of this section, prior to its amendment in 1997; the one-year statute of limitations expired several weeks prior to the effective date of the amended version of the statute. *Reeves v. State*, 374 Ark. 415, 288 S.W.3d 577 (2008).

Prosecution for abuse of a corpse under § 5-60-101(a) was barred by the three-year statute of limitations under subdivision (b)(2) of this section because it was not a continuing-course-of-conduct crime; once defendant disposed of the body parts in a pond, she was no longer physically mistreating the corpse. *McClanahan v. State*, 2010 Ark. 39, 358 S.W.3d 900 (2010).

### Evidence.

There was sufficient evidence that the sexual assault against one victim occurred in 2002 and, therefore, was within the three-year statute of limitations of subdivision (b)(2) of this section where the victim testified that defendant, a minister, assaulted her while she was working for the church during the summer of 2002. *Talbert v. State*, 367 Ark. 262, 239 S.W.3d 504 (2006).



Trial court did not err in denying defendant's motion to dismiss a rape charge based on failure to comply with the statute of limitations. Defendant's argument that the 2001 amendment to subdivision (b)(1)(B) of this section did not apply because there was no showing of an advancement in DNA testing failed. *Walker v. State*, 2010 Ark. App. 688, — S.W.3d — (2010).

lant worked for the employer, she misrepresented her identity as that of another woman, under subdivision (c)(1) of this section, her fraud suspended the statute of limitations until the offense was discovered and the police began their investigation. *Barron-Gonzalez v. State*, 2013 Ark. App. 120, — S.W.3d — (2013).

**Cited:** *Clark v. State*, 2012 Ark. App. 496, — S.W.3d — (2012).

### **Tolling the Statute.**

Because appellant's forgery offense involved fraud as, for the entire time appel-

## **5-1-110. Conduct constituting more than one offense — Prosecution.**

(a) When the same conduct of a defendant may establish the commission of more than one (1) offense, the defendant may be prosecuted for each such offense. However, the defendant may not be convicted of more than one (1) offense if:

(1) One (1) offense is included in the other offense, as defined in subsection (b) of this section;

(2) One (1) offense consists only of a conspiracy, solicitation, or attempt to commit the other offense;

(3) Inconsistent findings of fact are required to establish the commission of the offenses;

(4) The offenses differ only in that one (1) offense is defined to prohibit a designated kind of conduct generally and the other offense to prohibit a specific instance of that conduct; or

(5) The conduct constitutes an offense defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that a specific period of the course of conduct constitutes a separate offense.

(b) A defendant may be convicted of one (1) offense included in another offense with which he or she is charged. An offense is included in an offense charged if the offense:

(1) Is established by proof of the same or less than all of the elements required to establish the commission of the offense charged;

(2) Consists of an attempt to commit the offense charged or to commit an offense otherwise included within the offense charged; or

(3) Differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish the offense's commission.

(c) The court is not obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him or her of the included offense.

(d)(1) Notwithstanding any provision of law to the contrary, a separate conviction and sentence are authorized for:

(A) Capital murder, § 5-10-101, and any felony utilized as an underlying felony for the capital murder;

(B) Criminal attempt to commit capital murder, §§ 5-3-201 and 5-10-101, and any felony utilized as an underlying felony for the attempted capital murder;

(C) Murder in the first degree, § 5-10-102, and any felony utilized as an underlying felony for the murder in the first degree;

(D) Criminal attempt to commit murder in the first degree, §§ 5-3-201 and 5-10-102, and any felony utilized as an underlying felony for the attempted murder in the first degree; and

(E) Continuing criminal enterprise, § 5-64-405, and any predicate felony utilized to prove the continuing criminal enterprise.

(2) Pursuant to § 5-4-403, with respect to any offense mentioned in subdivision (d)(1) of this section, the trial judge may order that the multiple terms of imprisonment run concurrently or consecutively.

**History.** Acts 1975, No. 280, § 105; A.S.A. 1947, § 41-105; Acts 1995, No. 657, § 2; 2007, No. 670, § 1; 2009, No. 748, § 1.

**Amendments.** The 2009 amendment deleted “and former § 5-64-414” following “§ 5-64-405” in (d)(1)(E).

## RESEARCH REFERENCES

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

Recent Development: Arkansas Criminal Law — Felony Manslaughter as a

Lesser-Included Offense, 60 Ark. L. Rev. 1017.

## CASE NOTES

### ANALYSIS

Instructions.

Lesser Included Offenses.

Multiple Convictions.

### Instructions.

In a first-degree battery case, a trial court did not err by refusing to give an instruction on second-degree battery because it was not a lesser included offense; both alternatives given in the proffered instruction required an additional element, serious physical injury, that was not required in the first-degree battery instruction that was given, which only required physical injury when the injury was caused by a firearm. Further, the proffered instruction was not a lesser-included offense because the offense was not an attempt offense, and the proffered instruction did not differ from the offense charged only in the respect that a less

serious injury to the same person sufficed to establish the offense’s commission. *Spight v. State*, 101 Ark. App. 400, 278 S.W.3d 599 (2008).

Circuit court did not abuse its discretion in denying defendant’s second-degree battery instruction because the offense charged was first-degree battery pursuant to § 5-13-201(a)(3), and the jury was not required to find that defendant employed a firearm in order to convict him of that offense, nor was the jury required to apply the firearm enhancement if it convicted defendant of first-degree battery; the firearm enhancement was not an element of the first-degree-battery offense but was an additional sentence authorized by statute if defendant was convicted of first-degree battery, and the jury determined that defendant employed a firearm during commission of that offense. *Reed v. State*, 2011 Ark. App. 352, 383 S.W.3d 881 (2011).



**Lesser Included Offenses.**

Second-degree false imprisonment is not a lesser included offense of kidnapping; thus, instruction on second-degree or first-degree false imprisonment was not required in a kidnapping case. *Davis v. State*, 365 Ark. 634, 232 S.W.3d 476 (2006).

Circuit court erred in instructing the jury on felony manslaughter as a lesser included offense of capital felony murder, because the “extreme indifference” element was not a culpable mental state relating to a specific homicide victim but merely described the dangerous circumstances generally set in motion by defendant, and since the “extreme indifference” standard was not a mens rea related to a specific victim, it could not support a lesser included offense based on a less culpable mental state; the sole mens rea element in capital felony murder and first degree felony murder related to the underlying felony and not to the homicide itself. *Perry v. State*, 371 Ark. 170, 264 S.W.3d 498 (2007).

First-degree battery is not a lesser included offense of aggravated robbery as it is not established by proof of the same or less than all of the elements required to prove aggravated robbery. First-degree battery requires proof of the use of a firearm, whereas aggravated robbery does not; aggravated robbery requires proof of a robbery, whereas first-degree battery does not. *Clark v. State*, 373 Ark. 161, 282 S.W.3d 801 (2008).

Prohibition against double jeopardy was not violated when defendant was convicted of first-degree battery and aggravated robbery because the elements of the offenses were not the same, and first-degree battery was not a lesser included offense of aggravated robbery. *Clark v. State*, 373 Ark. 161, 282 S.W.3d 801 (2008).

Neither § 5-64-401(c)(1) nor § 5-64-403(c)(1)(A)(i) are lesser included offenses of the other pursuant to the terms of subsection (b) of this section because the plain language shows that possession of a controlled substance does not require the simultaneous possession of paraphernalia, and possession of paraphernalia does not require the simultaneous possession of a controlled substance; the elements of the two offenses can be completely exclu-

sive of each other. *Koster v. State*, 374 Ark. 74, 286 S.W.3d 152 (2008).

Trial court did not err during defendant’s trial in refusing to instruct a jury on the lesser offense of sexual assault in the second degree, in violation of § 5-14-125(a)(3)(A)-(B), on one count of rape, in violation of § 5-14-103(a)(3)(A), because sexual assault was not established by proof of the same or less than all of the elements required to establish rape, as required by subsection (b) of this section to be a lesser-included offense. *Joyner v. State*, 2009 Ark. 168, 303 S.W.3d 54 (2009), cert. denied, *Joyner v. Arkansas*, 558 U.S. 1047, 130 S. Ct. 736, 175 L. Ed. 2d 514 (2009).

Trial court did not err in refusing to instruct the jury on aggravated assault during defendant’s trial for aggravated robbery because aggravated assault, in violation of § 5-13-204(a)(1) and (2), was not a lesser-included offense of aggravated robbery pursuant to subdivision (b)(1) of this section as the two offenses required different elements of proof; aggravated assault required proof of circumstances manifesting extreme indifference to the value of human life, whereas aggravated robbery did not require such proof. *Matthews v. State*, 2009 Ark. 321, 319 S.W.3d 266 (2009).

In a case in which defendant was convicted of simultaneous possession of drugs and firearms and possession of a controlled substance with the intent to deliver and he argued that the latter conviction was a lesser-included offense of the simultaneous-possession charge and that his double-jeopardy rights had been violated because he had been convicted twice of the same crime, the latter conviction did not violate subdivision (a)(1) of this section. Under the Rowbottom decision, convictions for simultaneous possession of drugs and firearms and for possession with the intent to deliver did not violate double-jeopardy rules. *Lee v. State*, 2010 Ark. App. 224, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 289 (May 20, 2010).

Although there was not substantial evidence to support defendant’s convictions for aggravated assault pursuant to § 5-13-204(a) with respect to defendant side-swiping a victim’s vehicle on an interstate, under subsection (b) of this section, the evidence would clearly sustain convic-

tions for the lesser-included offense of first degree assault under § 5-13-205(a); the testimony established defendant acted recklessly when he approached the victim's vehicle from the rear, going very fast, and in passing the victim's vehicle on the left, defendant sideswiped the vehicle. *Mance v. State*, 2010 Ark. App. 472, — S.W.3d — (2010).

Sexual indecency with a child was not a lesser included offense of sexual assault in the first degree, as sexual indecency with a child required solicitation, which was not required for sexual assault in the first degree, and sexual assault in the first degree required that the sexual conduct occur but not that the defendant solicit the conduct. Sexual indecency with a child requires proof that the victim was less than fifteen years old, whereas sexual assault in the first degree only requires that the victim was less than eighteen years old. *Halliday v. State*, 2011 Ark. App. 544, 386 S.W.3d 51 (2011).

In a case in which a jury convicted defendant of capital murder in the shooting death of his ex-wife, the trial court properly refused to instruct the jury on reckless manslaughter and negligent homicide. Defendant, who fired once into a residence, mortally striking his ex-wife in the back, offered no rational basis to support giving either instruction on the basis that his actions were reckless or negligent. *Jones v. State*, 2012 Ark. 38, 388 S.W.3d 411 (2012).

In a criminal trial, the circuit court did not abuse its discretion in denying defendant's request to instruct the jury that second-degree sexual assault under § 5-14-125(a)(3) was a lesser offense included in rape of a person less than fourteen years of age, as defined in § 5-14-103(a)(3)(A), because the offense contained two elements not included in rape: defendant's age and marital status. Therefore, second-degree sexual assault was not a lesser offense included in rape under the tests set forth in subsection (b) of this section. *Webb v. State*, 2012 Ark. 64, — S.W.3d — (2012).

Defense counsel was not ineffective for not objecting that defendants' convictions violated double jeopardy under subsection (b) of this section because possession of drug paraphernalia with intent to manufacture methamphetamine was not a lesser-included offense of manufacturing

methamphetamine, in violation of § 5-64-101(m). *Myers v. State*, 2012 Ark. 143, — S.W.3d — (2012).

Appellant sentenced to 540 months' incarceration for manufacturing a controlled substance, two counts of possession of drug paraphernalia with the intent to manufacture methamphetamine, and failure to appear was not entitled to proceed with an appeal of the decision denying his petition for writ of habeas corpus. The trial court was not without jurisdiction to accept appellant's guilty plea for the charges of possession of drug paraphernalia with intent to manufacture methamphetamine, as it was not a lesser-included offense of manufacturing methamphetamine for purposes of subsection (b) of this section because the offenses do not share the same elements; a conviction for manufacturing methamphetamine requires the State to prove that a defendant is engaged in the production, preparation, propagation, compounding, conversion, or processing of methamphetamine, whereas possession of drug paraphernalia with intent to manufacture methamphetamine requires no such proof. *McHaney v. Hobbs*, 2012 Ark. 361, — S.W.3d — (2012).

Jury instruction on the lesser-included offense of attempted aggravated robbery was not warranted because there was no evidence of the offense of attempt under § 5-3-201(a)(2); when appellant stormed out of a retail store's stockroom brandishing a gun and pointing it employees, he actually completed the offense of aggravated robbery. *Thomas v. State*, 2012 Ark. App. 466, — S.W.3d — (2012).

### Multiple Convictions.

Trial court did not err in determining that consecutive sentencing for aggravated robbery, § 5-12-103(a)(1), first-degree terroristic threatening, § 5-13-301(a)(1)(A), and second-degree battery, § 5-13-202(a)(2), did not violate the prohibition against double jeopardy in Ark. Const. Art. 2, § 8 and the Fifth Amendment because neither first-degree terroristic threatening nor second-degree battery was a lesser-included offense of aggravated robbery since both crimes required proof of additional facts not required by aggravated robbery; the offense of first-degree terroristic threatening requires the elements of threatening to cause the death of the victim and the



purpose of terrorizing the victim, and a conviction for second-degree battery requires proof of purposely causing physical injury to the victim. *Walker v. State*, 2012 Ark. App. 61, 389 S.W.3d 10 (2012), review

denied, — S.W.3d —, 2012 Ark. LEXIS 95 (Ark. Feb. 23, 2012).

**Cited:** *Coombs v. Hot Springs Village Prop. Owners Ass'n*, 98 Ark. App. 226, 254 S.W.3d 5 (2007).

## **5-1-111. Burden of proof — Defenses and affirmative defenses — Presumption.**

### **RESEARCH REFERENCES**

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

### **CASE NOTES**

#### **ANALYSIS**

**Defenses.**  
**Evidence.**  
**Jurisdiction.**

#### **Defenses.**

Because defendant presented evidence arguably supporting self defense or a justification defense to a charge of aggravated assault under Arkansas law, the government had to negate that defense by a preponderance of the evidence for an enhancement for using the firearm in connection with another felony offense under U.S. Sentencing Guidelines Manual § 2K2.1(b)(5) [now (b)(6)] (2005), to apply because whether circumstances negated defendant's excuse or justification was an element of the offense under § 5-1-102(5)(C), which had to be proved by the state under subdivision (a)(1) of this section, and the definition of aggravated assault expressly excluded any person acting in self-defense or the defense of a third party under § 5-13-204(c)(2). *United States v. Raglin*, 500 F.3d 675 (8th Cir. 2007).

#### **Evidence.**

There was sufficient evidence that the sexual assault against one victim occurred in 2002 and, therefore, was within the three-year statute of limitations of § 5-1-109(b)(2) where the victim testified that

defendant, a minister, assaulted her while she was working for the church during the summer of 2002. *Talbert v. State*, 367 Ark. 262, 239 S.W.3d 504 (2006).

#### **Jurisdiction.**

Defendant's contention that the evidence was insufficient to prove that the murder took place in Arkansas was rejected as, although evidence showed that the victim's body was found in Oklahoma, and there was no positive evidence presented that the crime actually occurred outside of Arkansas; the record provided ample substantial evidence that, at the very least, the premeditation and deliberation element of capital murder and kidnapping by deception occurred in Arkansas. *Smith v. State*, 367 Ark. 274, 239 S.W.3d 494 (2006).

Fact that a victim was unable to provide details regarding the timing and location of the rape and the evidence that contradicted her testimony as to the location of the rapes was not positive evidence that the rape occurred outside the trial court's jurisdiction under this section; the victim's testimony that the rape occurred in Siloam Springs, Arkansas was substantial evidence that the trial court had jurisdiction. *Strickland v. State*, 2010 Ark. App. 599, 378 S.W.3d 157 (2010), rehearing denied, — S.W.3d —, 2010 Ark. App. LEXIS 744 (Ark. Ct. App. Oct. 27, 2010).

## 5-1-112. Affirmative defense — Former prosecution for same offense.

### CASE NOTES

#### ANALYSIS

Acquittal.

Attachment of Jeopardy.

Mistrial.

Overruling Necessity.

#### Acquittal.

Fifth Amendment and Ark. Const. Art. 2, § 8's double jeopardy clauses did not bar defendant's retrial on capital-murder and first-degree murder charges because, although the jury forewoman announced in open court that the jury had found defendant not guilty on those charges, the jury had deadlocked on a manslaughter charge, a mistrial was declared, and there were no "findings" or "verdicts"; a trial court's declaration of a mistrial because of a hung jury was not an event that terminated the original jeopardy to which defendant was subjected, and the mere reading of the jury's verdict in open court did not constitute an acquittal. The statutory provision for what constitutes an acquittal in no way forecloses the requirement that for an acquittal to be final it must be entered of record. *Blueford v. State*, 2011 Ark. 8, 370 S.W.3d 496 (2011), rehearing denied, — S.W.3d —, 2011 Ark. LEXIS 365 (Ark. Feb. 24, 2011), *aff'd*, *Blueford v. Arkansas*, — U.S. —, 132 S. Ct. 2044, 182 L. Ed. 2d 937, 2012 U.S. LEXIS 3941 (U.S. 2012).

#### Attachment of Jeopardy.

At the beginning of defendant's rape trial, voir dire was conducted by both parties and a jury was selected but not sworn; due to a four-month delay in trial while the parties awaited the results from the crime lab, the circuit court ordered a mistrial. Because the jury had not been sworn under oath, double jeopardy did not attach under this section. *Williams v. State*, 371 Ark. 550, 268 S.W.3d 868 (2007).

#### Mistrial.

Trial court did not err by not allowing defendant to present evidence at his second trial concerning his affirmative defense of double jeopardy under this sec-

tion, pursuant to which he would have presented evidence of the circumstances that resulted in the mistrial at his first trial, because doing so would allow a jury to usurp an appellate court's function of reviewing the mistrial by deciding whether there was an abuse of discretion as a question of fact, rather than requiring the issue to be reviewed on appeal as a matter of law. *Koster v. State*, 374 Ark. 74, 286 S.W.3d 152 (2008).

Mistrial was not justified when defense counsel's opening statement purportedly changed the theory of defense in a murder trial from self defense to accident; because the court could have taken corrective measures and proceeded with trial, the mistrial was unjustified, and any subsequent prosecution was prohibited. *Shelton v. State*, 2009 Ark. 388, 326 S.W.3d 429 (2009).

Denial of defendant's motions to bar his retrial on the charge of first-degree murder were proper because his trial ended in a mistrial without a final verdict entered in the record, and there was no actual verdict of acquittal under subdivision (1)(B)(i) of this section. Neither the transitional jury instruction nor the jury's written status report of the vote on the lesser-included charge negated the requirements for a formal verdict and there was no merit to defendant's arguments that the jury's note reflecting its vote on the lesser-included offense of second-degree murder constituted an implicit acquittal on the charge of first-degree murder, and that entry of the jury's note into the record rendered it controlling for the purpose of jeopardy on first degree. *Basham v. State*, 2011 Ark. App. 384, — S.W.3d — (2011).

#### Overruling Necessity.

State did not prove an overriding necessity to end a prior trial under subdivision (3) of this section to prevent a dismissal on double jeopardy grounds as a witness exceeded the trial judge's order not to tell the jury what conclusion to reach in the prior trial, but the testimony did not tell the jury what conclusion to reach; the

judge's admonition cured any error or prejudice. *Everetts v. State*, 2011 Ark. App. 629, — S.W.3d — (2011).

### **5-1-113. Affirmative defense — Former prosecution for different offense.**

#### **RESEARCH REFERENCES**

**U. Ark. Little Rock L. Rev.** Annual Survey of Case Law, Criminal Law, 28 U. Ark. Little Rock L. Rev. 690.

#### **CASE NOTES**

##### **Separate Offenses.**

Where charges against defendant for alleging defrauding insurers were dismissed, this did not mandate a later dismissal of subsequently filed charges alleg-

ing Medicaid fraud under *res judicata*, issue preclusion, or § 5-1-113 because the crimes were not the same. *Dilday v. State*, 369 Ark. 1, 250 S.W.3d 217 (2007).

### **5-1-114. Affirmative defense — Former prosecution in another jurisdiction.**

#### **RESEARCH REFERENCES**

**U. Ark. Little Rock L. Rev.** Annual Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

#### **CASE NOTES**

##### **Prosecution for Same Conduct.**

Defendant's acquittal of charges under 18 U.S.C.S. § 2423(a) in federal court did not operate as a bar to his statutory rape prosecution in state court as the underlying conduct upon which the federal conviction and Arkansas charge were based was not the same; a state jury's verdict

that an act of statutory rape occurred in Arkansas would not necessarily be consistent with a federal jury's finding that, at the point in time when defendant transported the minor across state lines, he did not intend for the minor to engage in sexual activity. *Winkle v. State*, 366 Ark. 318, 235 S.W.3d 482 (2006).

## **CHAPTER 2**

## **PRINCIPLES OF CRIMINAL LIABILITY**

### **SUBCHAPTER.**

3. MENTAL DISEASE OR DEFECT.
5. ORGANIZATIONS AND THEIR AGENTS.
6. JUSTIFICATION.



## SUBCHAPTER 2 — CULPABILITY

## 5-2-202. Culpable mental states — Definitions.

## RESEARCH REFERENCES

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

## CASE NOTES

## ANALYSIS

Purpose.  
Evidence.  
Instructions.  
Knowingly.  
Negligently.  
Purposely.  
Recklessly.

**Purpose.**

Evidence was sufficient to sustain defendant's first degree murder conviction because defendant had a key to the victim's apartment, he admitted that he was at the apartment on the evening of the murder, defendant purchased drugs that night and told the seller that he had "busted a some-bitch's head," and defendant lied to the police during the investigation. *Dunn v. State*, 371 Ark. 140, 264 S.W.3d 504 (2007).

Defendant's conviction for first-degree terroristic threatening, pursuant to § 5-13-301(a)(1)(A), could not stand because there was no evidence, either direct or circumstantial, that it was defendant's conscious object—in keeping with subdivision (1) of this section—that his threatening statements, made to his girlfriend, be communicated to the victim, his former wife. *Turner v. State*, 2010 Ark. App. 214, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 258 (May 6, 2010).

Sufficient evidence established defendant had the necessary purposeful intent, as defined in subdivision (1) of this section, to commit aggravated assault in violation of § 5-13-204(a) with respect to a vehicular incident on a local road because the victim testified defendant stopped his car, put it in reverse, and rammed into the victim's vehicle enough times and with

enough force to cause her vehicle to spin; the victim's testimony constituted substantial evidence that it was defendant's conscious object to engage in conduct that created a substantial danger of death or serious physical injury to the victim and her infant son, who was also in the car. *Mance v. State*, 2010 Ark. App. 472, — S.W.3d — (2010).

**Evidence.**

Defendant's convictions were supported by substantial evidence where it was shown that (1) shortly after the incident, defendant had a blood-alcohol level of .23 percent, (2) defendant was driving the car that hit two women and narrowly missed a third, (3) just before the impact, defendant was witnessed to speed up and actually swerve the vehicle toward the women's path, and (4) defendant drove away after the impact. *Estacuy v. State*, 94 Ark. App. 183, 228 S.W.3d 567 (2006).

Evidence was sufficient to sustain defendant's kidnapping conviction as the 13 year old victim's mother relied upon the representation that defendant was taking the victim to the movies with his daughter when she gave permission for the victim to leave her home with defendant; the victim's mother did not consent to defendant escorting her daughter to a motel room under the guise of meeting someone briefly before meeting her daughter at the movies. *Mitchem v. State*, 96 Ark. App. 78, 238 S.W.3d 623 (2006).

Evidence was sufficient to sustain defendant's convictions for manslaughter because two people in a motor home were killed when defendant drove a fully loaded commercial vehicle weighing over 82,000 pounds, while under the influence of methamphetamine, into the oncoming-traffic lane, striking the motor home, and ultimately driving through it. Defendant



never attempted to brake prior to the accident or to return to the proper lane of traffic. *Hoyle v. State*, 371 Ark. 495, 268 S.W.3d 313 (2007), rehearing denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 12 (Jan. 10, 2008).

Where defendant picked his ex-wife up from work, took her cell phone, started a verbal altercation, drove her to a bridge, stabbed her, threw her to the ground, and pushed her into the water, the evidence was sufficient to prove that defendant possessed the requisite state of mind under subdivision (1) of this section to support his conviction for attempted first-degree murder of his ex-wife. *Jones v. State*, 2009 Ark. App. 135, — S.W.3d — (2009).

Sufficient evidence supported the conclusion that a defendant intended to kill a victim: a witness testified that the witness gave defendant a gun, other witnesses testified that defendant shot the victim with that gun, defendant's girlfriend testified that while waiting for defendant in a car, the girlfriend heard two or three shots, and then defendant ran to the car, and inconsistent witness statements regarding whether the shooting occurred inside or outside the victim's apartment were not relevant to the conviction; therefore, defendant's motion for a directed verdict was properly denied. *Hawkins v. State*, 2009 Ark. App. 675, — S.W.3d — (2009).

Evidence supporting defendant's convictions for three counts of delivering a controlled substance in violation of § 5-64-401 was substantial because the jury had substantial, if not overwhelming, evidence from which to infer with reasonable certainty from the circumstances that defendant formed the necessary criminal intent to sell a confidential informant crack cocaine; a captain of the police department testified that his office received multiple calls indicating that defendant was engaged in selling controlled substances, and evidence was presented that on three occasions the confidential informant assisted the police in making controlled buys of crack cocaine from defendant and that the substances the confidential informant purchased from defendant tested positive for crack cocaine. *Edwards v. State*, 2010 Ark. App. 59, 377 S.W.3d 271 (2010).

Trial court did not err by denying defendant's motions for a directed verdict because substantial evidence supported his conviction, as there was evidence that: (1) defendant had prior knowledge of his wife's affair with the victim and investigated the victim's background; (2) defendant waited in his truck after arriving at the store until the victim and his wife were standing by their vehicles; and (3) defendant fired multiple shots, chased the victim, and stood over him to deliver a final shot to the head. *James v. State*, 2010 Ark. 486, 372 S.W.3d 800 (2010).

### Instructions.

In a case in which a jury convicted defendant of capital murder in the shooting death of his ex-wife, the trial court properly refused to instruct the jury on reckless manslaughter and negligent homicide. Defendant, who fired once into a residence, mortally striking his ex-wife in the back, offered no rational basis to support giving either instruction on the basis that his actions were reckless or negligent. *Jones v. State*, 2012 Ark. 38, 388 S.W.3d 411 (2012).

### Knowingly.

Defendant's conviction for battery in the second degree was appropriate under §§ 5-13-202(a)(4)(C) and 5-2-202(2) because the evidence was clear that defendant intended to restrain the victim. The victim, defendant's mother-in-law, testified that defendant grabbed her, threw her into a chair, and pushed her down anytime the victim had tried to stand up. *LaFort v. State*, 98 Ark. App. 202, 254 S.W.3d 27 (2007).

Where defendant took a loaded gun from his vehicle after seeing the victim's group outside a department store and deliberately shot the victim three times at close range, the jury could infer that he knowingly caused the victim's death for purposes of subdivision (2)(A) and (B) of this section; the trial court did not abuse its discretion by admitting defendant's statement that he shot the victim, because he wanted to give him an early Christmas present. The statement was probative of defendant's state of mind as well as his lack of remorse; because the evidence was sufficient to support defendant's conviction for second degree murder in violation of § 5-10-103(a)(1), the trial court did not

err by denying his motion for a directed verdict. *Vorachith v. State*, 2009 Ark. App. 656, — S.W.3d — (2009).

Appellants' convictions for theft of property were affirmed because substantial evidence supported the convictions where (1) while appellants maintained they were simply running a business and made some poor business decisions, the testimony of the victims established a pattern of taking and exercising unauthorized control over the victims' money with the purpose of depriving the victims of their money; (2) the pattern demonstrated that appellants sold items to the victims, accepted the victims' money, purposefully and knowingly delayed delivery of the merchandise, and offered multiple and most often untrue excuses for why the orders did not arrive; and (3) the evidence showed that appellants would tell customers that an item was in shipping, was shipped in the wrong color, back ordered, or damaged in shipping. *Williams v. State*, 2009 Ark. App. 848, — S.W.3d — (2009).

Defendant's conviction for murder in the second degree, with a firearm enhancement, was proper because defendant acted knowingly to cause the victim's death under circumstances manifesting extreme indifference to the value of human life, as described in subdivision (2) of this section. The issues involved credibility and it was presumed that a person intended the natural and probable consequences of his or her acts; defendant shot her husband in the wrist with a handgun, he bled to death as a result of the wound, and additional evidence indicated that the fatal wound was defensive in nature. *Johnson v. State*, 2010 Ark. App. 153, 375 S.W.3d 12 (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 257 (May 6, 2010).

Appellant's conviction for second-degree murder was affirmed because the pattern of the gunshots, which were aimed at the victim's chest and upper-arm area, as well as the trajectory of the bullets showed that appellant acted deliberately in a manner that would naturally and probably culminate in the victim's death. *Phillips v. State*, 2011 Ark. App. 575, 386 S.W.3d 99 (2011).

Defendant's conviction for second-degree battery, in violation of § 5-13-202(a)(4)(C), was supported by the evidence because the number of bruises on

his girlfriend's 23-month-old son and the unusual force necessary to cause them, as testified to by an emergency room pediatrician, provided proof that he knowingly caused physical injury under subdivision (2)(B) of this section. *Hahn v. State*, 2012 Ark. App. 297, — S.W.3d — (2012).

In his directed verdict motion, appellant did not argue that the State did not prove that he knew of the card's existence in the wallet when he stole it, and that he purposely deprived the owner of the card, and thus this argument was barred from appellate review; even if the court reached the argument, it lacked merit, because (1) the statute only required that one knowingly take unauthorized control over property, and it did not require that one know the value or character of the property that was taken, (2) appellant did not dispute that he knowingly took the owner's wallet with the intent of depriving him of it, (3) his knowledge of the contents of the wallet was not necessary for his conviction, and (4) his unauthorized taking of the wallet that had the debit card was one act and he was liable for all property taken, such that the evidence was sufficient to support his theft conviction. *Blakely v. State*, 2013 Ark. App. 37, — S.W.3d — (2013).

### **Negligently.**

In defendant's trial for criminally negligent homicide, the trial court erred in failing to grant defendant's motion for directed verdict where the state's evidence that defendant's truck merely crossed the center line of a road was insufficient to support a finding of criminal negligence; this was a different standard from the evidence needed to support a finding of civil negligence. *Uteley v. State*, 93 Ark. App. 381, 219 S.W.3d 709 (2005), rev'd, 366 Ark. 514, 237 S.W.3d 27 (2006).

Evidence was sufficient to support defendant's conviction of negligent homicide where the jury could conclude that defendant's failure to perceive the risk under the facts constituted a gross deviation from the standard of care that a reasonable person would observe in defendant's position. *Uteley v. State*, 366 Ark. 514, 237 S.W.3d 27 (2006).

Appellants' convictions for negligent homicide in the death of their daughter were affirmed; given the record—which included appellants allowing three hours to pass without checking on or knowing the



whereabouts of their twenty-two-month-old child—the instant court could not say that the verdicts were not supported by substantial evidence. *Marin v. State*, 2009 Ark. App. 802, — S.W.3d — (2009).

Because there was no negligent behavior on the part of defendant pursuant to subsection (4) of this section, his action were purposeful, and a firearm and tool-mark examiner for the Arkansas State Crime Lab testified that for the gun to be fired, the trigger had to be pulled, which usually required five to five and a half pounds of pressure, the trial court did not err in refusing to give the jury an instruction on negligent homicide under § 5-10-105(b)(1). *Ratterree v. State*, 2012 Ark. App. 701, — S.W.3d —, 2012 Ark. App. LEXIS 821 (Dec. 12, 2012).

### **Purposely.**

Evidence was sufficient to sustain defendant's forgery and theft convictions where she did not offer a reasonable explanation of how she acquired the forged check; therefore, an inference that she committed the forgery or was an accessory to its commission was warranted and the court did not err in inferring defendant's intent. *DeShazer v. State*, 94 Ark. App. 363, 230 S.W.3d 285 (2006).

There was sufficient evidence for the jury to determine that defendant had the requisite mens rea for first-degree murder at the time he shot and killed his wife as an expert for the state testified that defendant did not have a mental disease or defect at the time of the shooting; the jury was entitled to believe the state's expert over defendant's expert. *Davis v. State*, 368 Ark. 401, 246 S.W.3d 862 (2007).

Circuit court did not err by admitting into evidence photographs of the murder victim because her wounds were relevant to show defendant's intent to kill her; they also assisted the jury in understanding the crime-scene investigator's description of the scene, and the circuit court performed a proper evaluation of the photographs before allowing them to be presented to the jury. *Davis v. State*, 368 Ark. 401, 246 S.W.3d 862 (2007).

Evidence was sufficient to sustain a first degree murder conviction because defendant admitted to hitting, kicking, and stabbing the victim, a knife blade was found at the crime scene, and a matching handle was later found at defendant's

house, and defendant's statement to the investigating officer indicated that his conscious object was to cause the death of the victim. *Navarro v. State*, 371 Ark. 179, 264 S.W.3d 530 (2007).

Evidence was sufficient to show that defendant acted "under circumstances manifesting extreme indifference to the value of human life" and to sustain his conviction for first degree battery because defendant admittedly placed a child in a tub of water so hot that it severed the skin from his feet, and defendant's own statements, although inconsistent, supported the conclusion that he knew that it was his responsibility to properly supervise the child during a bath and to ensure a safe water temperature and that he consciously disregarded the risks involved. *Bell v. State*, 99 Ark. App. 300, 259 S.W.3d 472 (2007).

Evidence was sufficient to support a conviction for first-degree battery under § 5-13-201(a)(8) where defendant purposely fired three times at an occupied truck on a highway; a passenger was struck and seriously injured. There was a presumption that defendant intended the natural and probable consequences of his actions. *Spight v. State*, 101 Ark. App. 400, 278 S.W.3d 599 (2008).

Defendant's conviction for theft of property lost, mislaid, or mistakenly delivered was supported by the evidence because defendant failed to take reasonable measures to return a double payment made to defendant's business on behalf of a customer, and acted with purposeful intent under subdivision (1) of this section of depriving the victims. *Cora v. State*, 2009 Ark. App. 431, 319 S.W.3d 281 (2009).

Evidence was sufficient to support defendant's conviction of first-degree murder for the killing of a romantic rival and to establish the requisite intent of purposefulness because it showed that defendant, while possessing a knife, drove to the victim's residence, confronted her, and stabbed her with the knife in the ensuing altercation. *Mooney v. State*, 2009 Ark. App. 622, 331 S.W.3d 588 (2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 820 (Dec. 10, 2009).

Trial court did not err in refusing to direct the verdicts where defendant took actions to conceal the harm to the child, and failed to take action to secure appropriate care for the child; the jury could



conclude that defendant rubbing a substance known to cause skin irritation on the face of a toddler where Superglue had already adhered would cause, at the very least, the impairment of physical condition or a visible mark associated with the physical trauma. *Price v. State*, 2009 Ark. App. 664, 344 S.W.3d 678 (2009).

Defendant's conviction for first-degree criminal mischief under § 5-38-203(a)(1) was supported by substantial evidence as: (1) it was fair to presume that defendant purposely for purposes of subdivision (1) of this section broke a former supervisor's car windows when defendant repeatedly swung a long, heavy metal object at them; (2) defendant's statement to the supervisor immediately prior to smashing the supervisor's windows that defendant should "kick (the supervisor's) ass" demonstrated defendant's anger and indicated a desire to express that anger with violence; and (3) defendant failed to support a claim that defendant's actions were justified. *Warren v. State*, 2011 Ark. App. 102, — S.W.3d — (2011).

Defendant's conviction for domestic battering under § 5-26-304(a)(2) was supported by sufficient evidence because the state showed that, with the purpose of causing physical injury, defendant caused injury to the victim, his brother, by means of a deadly weapon. While defendant contended that he was acting in self-defense when he struck the victim with a sickle, the testimony of the victim and the victim's brother established that the victim did not have the gun that he had when police arrived until after defendant had battered both the victim and the victim's brother. *Brown v. State*, 2011 Ark. App. 150, 381 S.W.3d 175 (2011).

State failed to show that a juvenile engaged in disorderly conduct in a reckless or purposeful manner as those terms were defined by this section, as the juvenile's behavior in unexpectedly coming upon a scene in which the juvenile's mother was being arrested was not a gross deviation from a reasonable standard of care. *M.J. v. State*, 2011 Ark. App. 171, 381 S.W.3d 880 (2011), rehearing denied, — Ark. App. —, — S.W.3d —, 2011 Ark. App. LEXIS 300 (Apr. 13, 2011).

During a trial for breaking or entering, the jury was not required to believe defendant's claim that defendant did not enter a vehicle with the intent to steal anything

under subdivision (1) of this section, but instead to have a place to sleep; defendant's argument overlooked the fact that an officer found a car-stereo faceplate in defendant's pocket. *Pruitt v. State*, 2011 Ark. App. 754, — S.W.3d — (2011).

Substantial evidence supported a finding that defendant acted purposely, within the meaning of subdivision (1) of this section, when he discharged a gun in the direction of a step that was three steps down from where the assault victim was standing. Defendant's explanation of the gun accidentally firing did not match the physical evidence of bullet fragments found near a pock mark on the first step to the front porch and both the victim and defendant being wounded. *Montalvo v. State*, 2012 Ark. App. 119, — S.W.3d — (2012).

Evidence was sufficient to convict defendant of first-degree murder under § 5-10-102(a)(2) because the three gunshot wounds to the victim alone, at least two of which were fired 35-40 seconds apart, ran counter to defendant's accidental shooting theory; and the evidence supported an inference of purposeful intent under subdivision (1) of this section. *Smith v. State*, 2012 Ark. App. 359, — S.W.3d — (2012).

Evidence was sufficient to sustain defendant's attempted first-degree murder conviction because defendant knocked on a door and fired a gun at the victim when he opened the door. The jury could reasonably have inferred that defendant purposely engaged in conduct that constituted a substantial step in a course of conduct known to cause death to another person, regardless of that person's identity. *Wells v. State*, 2012 Ark. App. 596, — S.W.3d —, 2012 Ark. App. LEXIS 718 (Oct. 24, 2012).

During an inmate's trial for murder in the first degree, in violation of § 5-10-102(a)(2), the court did not err in denying his motion for a directed verdict because there was ample evidence to support the conclusion that he purposely caused the victim's death under subdivision (1) of this section; he admitted to the crime and that it was his intent to kill the victim and that he had to think about how to do it. *Kaufman v. State*, 2013 Ark. 126, — S.W.3d — (2013).

Denial of postconviction relief was proper, because the petitioner failed to show the second-degree-murder instruc-

tion added an extra element not present in the greater offense of first-degree murder and that counsel should have objected; Second-degree murder was a lesser-included offense of first-degree murder, as it differed from the greater offense only to the extent that it required a lesser kind of culpable mental state. *Holloway v. State*, 2013 Ark. 140, — S.W.3d — (2013), rehearing denied, — S.W.3d —, 2013 Ark. LEXIS 231 (Ark. May 9, 2013).

### **Recklessly.**

Evidence was sufficient to show that defendant acted recklessly as to her son's abuse where she was confronted by her sister-in-law regarding concerns that defendant's son was being abused and defendant did nothing to prevent future abuse. *Graham v. State*, 365 Ark. 274, 229 S.W.3d 30 (2006).

Defendant's convictions for manslaughter, in violation of § 5-10-104(a)(3), were modified to the lesser-included offense of negligent homicide under § 5-10-105(b)(1) because defendant's acts of crossing the center line, tailgating, and averting defendant's eyes from the road constituted negligence, not recklessness under subdivision (3) of this section. *Rollins v. State*, 2009 Ark. App. 110, 302 S.W.3d 617 (2009), rev'd, 2009 Ark. 484, 347 S.W.3d 20 (2009).

State produced evidence in the form of a witness that defendant pushed the victim from a moving vehicle and that he struck her afterwards as she lay on the ground; by pushing the victim from a moving vehicle and then kicking her, defendant consciously disregarded the risk that his actions would cause injury to the victim, and there was substantial evidence to support a finding that defendant recklessly caused physical injury to the victim. *Lasker v. State*, 2009 Ark. App. 591, — S.W.3d — (2009).

Evidence supported the inference that defendant juvenile intended to engage in the conduct of hitting a nurse and threatening her and a doctor's lives to create public inconvenience, annoyance, or alarm in violation of § 5-71-207 because the nurse testified that defendant attacked her on several different occasions, and defendant did not argue that he was in any way incapable of controlling his actions at the time he threatened to kill either the nurse or the doctor and struck

the nurse; at the very least, defendant consciously disregarded the effects of his actions. *M. T. v. State*, 2009 Ark. App. 761, 350 S.W.3d 792 (2009).

State failed to show that a juvenile engaged in disorderly conduct in a reckless or purposeful manner as those terms were defined by this section, as the juvenile's behavior in unexpectedly coming upon a scene in which the juvenile's mother was being arrested was not a gross deviation from a reasonable standard of care. *M.J. v. State*, 2011 Ark. App. 171, 381 S.W.3d 880 (2011), rehearing denied, — Ark. App. —, — S.W.3d —, 2011 Ark. App. LEXIS 300 (Apr. 13, 2011).

During defendant's trial for permitting the abuse of her minor child, the court did not err in allowing defendant's mother to testify regarding her reaction to the child's injuries; the testimony was relevant as to whether defendant recklessly failed to take action to prevent the abuse under subdivision (3) of this section. *Sullivan v. State*, 2012 Ark. 74, 386 S.W.3d 507 (2012).

During parents' trial for first-degree battery against their infant, the court did not err in refusing to instruct the jury on the lesser-included offense of third-degree battery because regardless of whether there was some reckless conduct under subdivision (3) of this section, the physical injury the infant sustained could only be described as serious; the infant was severely malnourished to the point of starvation and death would have occurred within days without medical attention. *Bruner v. State*, 2013 Ark. 68, — S.W.3d — (2013).

Because the attorney committed the drug and drug paraphernalia possession crimes with only a reckless mental state under subdivision (3) of this section and § 5-2-203(b), had been rehabilitated, had successfully completed his suspended sentence, and had successfully established his present mental and emotional stability and good moral character, the attorney was not prevented from being readmitted to the Arkansas Bar under Ark. Sup. Ct. P. Reg. Prof'l Conduct § 24(B)(2), and his request for readmission to the Arkansas Bar pursuant to Ark. R. Admis. Bar XIII(G) was granted. *In re Haynes*, 2013 Ark. 102, — S.W.3d — (2013).

Substantial evidence supported defendant's manslaughter convictions under



§ 5-10-104(a)(3) and subdivision (3) of this section given defendant's ingestion of 11 controlled substances prior to driving her SUV across the center line, running two vehicles off the road before striking the victims' car, which had pulled onto the shoulder. *Dail v. State*, 2013 Ark. App. 184, — S.W.3d — (2013).

**Cited:** *Henson v. State*, 94 Ark. App. 163, 227 S.W.3d 450 (2006); *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676

(2006); *Bell v. State*, 371 Ark. 375, 266 S.W.3d 696 (2007); *Law v. State*, 375 Ark. 505, 292 S.W.3d 277 (2009); *Jackson v. State*, 2009 Ark. 336, 321 S.W.3d 260 (2009); *Moseby v. State*, 2010 Ark. App. 5, — S.W.3d — (2010); *Lee v. State*, 2010 Ark. App. 15, — S.W.3d — (2010); *Freeman v. State*, 2010 Ark. App. 90, — S.W.3d — (2010); *Banks v. State*, 2011 Ark. App. 249, — S.W.3d — (2011); *Stevenson v. State*, 2013 Ark. 100, — S.W.3d — (2013).

## 5-2-203. Culpable mental states — Interpretation of statutes.

### RESEARCH REFERENCES

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

### CASE NOTES

#### ANALYSIS

**Legislative Intent.**  
**Recklessly.**

#### **Legislative Intent.**

In a first-degree felony murder case, the Supreme Court rejected defendant's contention that it erred in deciding *Perry v. State* and *Hill v. State* by failing to apply subsection (b) of this section. Contrary to defendant's suggestion that its decisions ignored the legislature's mandate stated in subsection (b), the Supreme Court's felony-murder jurisprudence was in concert with the legislature's intent. *Holian v. State*, 2013 Ark. 7, — S.W.3d —, 2013 Ark. LEXIS 11 (Jan. 17, 2013).

#### **Recklessly.**

Because the attorney committed the drug and drug paraphernalia possession

crimes with only a reckless mental state under § 5-2-202(3) and subsection (b) of this section, had been rehabilitated, had successfully completed his suspended sentence, and had successfully established his present mental and emotional stability and good moral character, the attorney was not prevented from being readmitted to the Arkansas Bar under Ark. Sup. Ct. P. Reg. Prof'l Conduct § 24(B)(2), and his request for readmission to the Arkansas Bar pursuant to Ark. R. Admis. Bar XIII(G) was granted. *In re Haynes*, 2013 Ark. 102, — S.W.3d — (2013).

**Cited:** *Edwards v. State*, 2010 Ark. App. 59, 377 S.W.3d 271 (2010).

## 5-2-204. Elements of culpability — Exceptions to culpable mental state requirement.

### RESEARCH REFERENCES

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.



## CASE NOTES

**Mental State Irrelevant.**

Because the failure to register as a sex offender was a strict liability offense under § 12-12-901 et seq. and the state proved that defendant was required to register but failed to do so, the trial court

did not err by denying defendant's motion for a directed verdict. *Adkins v. State*, 371 Ark. 159, 264 S.W.3d 523 (2007).

**Cited:** *Henson v. State*, 94 Ark. App. 163, 227 S.W.3d 450 (2006).

**5-2-205. Causation.**

## CASE NOTES

## ANALYSIS

Death.

Evidence.

**Death.**

Defendant's conviction for capital murder under subdivision (a)(4) of this section was proper because the circuit court did not err in denying his motion for a directed verdict. Defendant's stabbing of the victim brought about the officers' use of deadly force that killed the victim; had defendant not been stabbing her, the officers would not have attempted to end defendant's attack on her by using deadly force. *Anderson v. State*, 2011 Ark. 461, 385 S.W.3d 214 (2011).

**Evidence.**

Trial court did not err by denying defendant's motion for a directed verdict on the capital murder charge because: (1) but for defendant's aggravated robbery, speeding,

and fleeing from the police, the trooper would not have been in the roadway attempting to retrieve stop sticks and would not have been struck by another trooper's vehicle; (2) the state presented sufficient evidence that defendant acted under circumstances manifesting an extreme indifference to the value of human life, as it showed that defendant robbed the victim with a gun, fled with his accomplice and the loot in a stolen car on a busy interstate, and initiated a high-speed chase while being pursued by several law enforcement officers with their lights and sirens blaring, thereby engaging in life-threatening activity; and (3) the phrase "under circumstances manifesting extreme indifference to the value of human life" was not void for vagueness, as the cases interpreting the phrase provided fair warning that it involved a life-threatening activity. *Jefferson v. State*, 372 Ark. 307, 276 S.W.3d 214 (2008).

**5-2-206. Ignorance or mistake.**

## RESEARCH REFERENCES

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

## CASE NOTES

**Cited:** *Jester v. State*, 367 Ark. 249, 239 S.W.3d 484 (2006).

**5-2-207. Intoxication.****RESEARCH REFERENCES**

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

**5-2-208. Duress.****RESEARCH REFERENCES**

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

**5-2-209. Entrapment.****RESEARCH REFERENCES**

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

**CASE NOTES****ANALYSIS**

Admission of Crime.  
Elements of Defense.  
Evidence.

**Admission of Crime.**

Trial court did not err in evoking defendant's suspended sentence on the ground that he committed the offense of possession of drug paraphernalia with the intent to manufacture methamphetamine in violation of § 5-64-403(c)(5) because the evidence showed that a reliable source had tipped off the police to the fact that defendant, contrary to the terms and conditions of his release, was continuing to manufacture methamphetamine, and defendant directed the purchases and provided an explanation for each component of the methamphetamine recipe; it was shown that defendant conceived and proposed the methamphetamine cook, buy, and sell arrangement for the manufacture and distribution of the illegal substance, and simply by asserting the defense of entrapment under this section, defendant necessarily admitted committing the offense. *Lowe v. State*, 2010 Ark. App. 284, — S.W.3d — (2010).

Defendant, who was convicted for internet stalking, should have been permitted to plead entrapment under this section as an affirmative defense while at the same time denying one or two elements of the crime, and therefore defendant's conviction was reversed, because the doctrine requiring a defendant to admit to all the elements of a crime in order to plead entrapment could result in punishment upon a defendant who was merely entrapped; the doctrine could possibly punish a defendant for a serious crime for merely seeking to require the state to prove its case aside from offering an affirmative defense. *Smoak v. State*, 2011 Ark. 529, 385 S.W.3d 257 (2011), rehearing denied, — S.W.3d —, 2012 Ark. LEXIS 26 (Ark. Jan. 19, 2012).

**Elements of Defense.**

Circuit court did not err in rejecting criminal defendant's proffered instruction on the defense of entrapment where co-defendant waived the defense prior to trial. *Montgomery v. State*, 367 Ark. 485, 241 S.W.3d 753 (2006).

**Evidence.**

Denial of appellant's, an inmate's, petition for writ of certiorari was improper

because the evidence at issue presented a jury question concerning whether the informant had induced the commission of the offense, and the jury was given an instruction on the affirmative defense of

entrapment. Thus, the inmate failed to prove that he received the ineffective assistance of counsel. *Lowe v. State*, 2012 Ark. 185, — S.W.3d — (2012).

### SUBCHAPTER 3 — MENTAL DISEASE OR DEFECT

#### SECTION.

5-2-301. Definitions.

5-2-305. Mental health examination of defendant.

5-2-310. Lack of fitness to proceed — Procedures subsequent to finding.

5-2-314. Acquittal — Examination of defendant — Hearing.

#### SECTION.

5-2-315. Discharge or conditional release.

5-2-316. Conditional release — Subsequent discharge, modification, or revocation.

5-2-326. Restraint of an Arkansas State Hospital patient.

**Effective Dates.** Acts 2007, No. 463, § 6: July 1, 2007. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that federal law prohibits the sale of firearms to persons who have been committed to a mental institution; that it is the intent of this act to require the submission of information to create a confidential database that may only be used for firearm sales or transactions; and that this act is necessary because possession of a firearm by a person that is suicidal, homicidal, or gravely disabled poses an critical threat of harm to the citizens of this state. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2007.”

Acts 2007, No. 623, § 2: Mar. 28, 2007. Emergency clause provided: “It is found

and determined by the General Assembly of the State of Arkansas that the present procedure for revocation of conditional release orders is inadequate to protect the public; that this act is necessary to clarify and refute the Original Commentary regarding § 5-2-316(b); and that this act is necessary to assure continued treatment for those persons who cannot or will not maintain appropriate treatment and who have previously shown the capacity to commit felonies. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

#### 5-2-301. Definitions.

As used in this subchapter:

(1) “Appropriate facility” means any facility within or without this state to which a defendant is eligible for admission and treatment for mental disease or defect;

(2) “Capacity of the defendant to have the culpable mental state” means a defendant’s ability to have the culpable mental state necessary to establish an element of the offense charged, as defined in § 5-2-202;



(3) "Compliance monitor" means either a social service representative or licensed social worker, or both, employed by the Department of Human Services for the purpose of, including, but not limited to:

(A) Verifying that a person conditionally released pursuant to a provision of this subchapter is in compliance with the conditions for release;

(B) Providing social service assistance to a person conditionally released pursuant to a provision of this subchapter; and

(C) Reporting compliance with the conditions for release or lack of compliance with the conditions for release to the appropriate circuit court;

(4) "Designated receiving facility or program" means an inpatient or outpatient treatment facility or program that is designated within each geographic area of the state by the Director of the Division of Behavioral Health Services of the Department of Human Services to accept the responsibility for the care, custody, and treatment of a person involuntarily admitted to the state mental health system;

(5) "Frivolous" means clearly lacking any basis in fact or law;

(6)(A) "Mental disease or defect" means a:

(i) Substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life;

(ii) State of significantly subaverage general intellectual functioning existing concurrently with a defect of adaptive behavior that developed during the developmental period; or

(iii) Significant impairment in cognitive functioning acquired as a direct consequence of a brain injury.

(B) As used in the Arkansas Criminal Code, "mental disease or defect" does not include an abnormality manifested only by:

(i) Repeated criminal or otherwise antisocial conduct;

(ii) Continuous or noncontinuous periods of intoxication, as defined in § 5-2-207(b)(1), caused by a substance such as alcohol or a drug; or

(iii) Dependence upon or addiction to any substance such as alcohol or a drug;

(7) "Prescribed regimen of medical, psychiatric, or psychological care or treatment" means to care or treatment for a mental illness, as defined in § 20-47-202;

(8) "Qualified psychiatrist" means a licensed psychiatrist who has successfully completed or is currently participating in a post-residency fellowship in forensic psychiatry accredited by the American Board of Psychiatry and Neurology, Inc., or has successfully completed a forensic certification course approved by the department, and who is currently approved by the department to administer a forensic examination as defined in this subchapter;

(9) "Qualified psychologist" means a licensed psychologist who has successfully completed or is currently participating in a formal post-doctoral fellowship training program in forensic psychology or has

successfully completed a forensic certification course approved by the department, and who is currently approved by the department to administer a forensic examination as defined in this subchapter;

(10) “Repetitive” means filed within six (6) months of an application under § 5-2-316 that has been previously denied and that fails to demonstrate a material change in circumstances;

(11)(A) “Restraint” means any manual method, physical or mechanical device, material, or equipment that immobilizes a person or reduces the ability of a person to move his or her arms, legs, body, or head freely.

(B) “Restraint” does not include devices such as orthopedically prescribed devices, surgical dressings or bandages, protective helmets, or other methods that involve the physical holding of a person for the purpose of protecting the person from falling or to permit the person to participate in activities without the risk of physical harm to himself or herself; and

(12) “State mental health system” means the Arkansas State Hospital and any other facility or program certified by the Division of Behavioral Health Services of the Department of Human Services.

**History.** Acts 1975, No. 280, § 616; A.S.A. 1947, § 41-616; Acts 1995, No. 767, § 1; 1997, No. 922, § 1; 2001, No. 1554, § 1; 2007, No. 636, § 1; 2013, No. 981, §§ 1, 2.

**Amendments.** The 2013 amendment redesignated former (7) and (8) as present (8) and (9); in present (8), substituted

“either” for “or is currently participating in” and inserted “has successfully completed”; substituted “received a post doctoral ... Psychology or” for “successfully completed or is ... psychology or has” in present (9); and inserted present (5) and (10) and redesignated the remaining subdivisions accordingly.

## RESEARCH REFERENCES

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

## 5-2-302. Lack of fitness to proceed generally.

### CASE NOTES

#### Competency.

Where doctor determined that defendant demonstrated a fully-developed, persecutory-type delusion, the court suspended defendant’s trial for attempting to commit capital murder and did not proceed until his fitness was restored; at that time, two doctors testified that defendant did not lack the capacity to understand the proceedings against him and to assist effectively in his own defense. *Steward v. State*, 95 Ark. App. 6, 233 S.W.3d 180 (2006).

Determination of defendant’s capacity was supported by credible testimony of a qualified medical expert that defendant, despite some mental illness, understood the proceedings sufficiently to assist counsel in defendant’s defense. *Bayless v. State*, 2010 Ark. App. 456, — S.W.3d — (2010).

**Cited:** *Smith v. State*, 2011 Ark. App. 104, 380 S.W.3d 524 (2011).



**5-2-303. Admissibility of evidence to show mental state.****CASE NOTES****Instructions.**

Trial court properly refused to instruct the jury on defendant's mental state because the requested instruction was a modified version of the model instructions and the jury had been instructed regard-

ing the state's burden of proof and the elements of first-degree murder and lesser offenses so that the instruction was effectively given. *Ross v. State*, 96 Ark. App. 385, 242 S.W.3d 298 (2006).

**5-2-305. Mental health examination of defendant.**

(a)(1) Subject to the provisions of §§ 5-2-304 and 5-2-311, the court shall immediately suspend any further proceedings in a prosecution if:

(A)(i) A defendant charged in circuit court files notice that he or she intends to rely upon the defense of mental disease or defect.

(ii) After the notice of intent to raise the defense of not guilty for reason of mental disease or defect is filed, any party may petition the court for a criminal responsibility examination and opinion.

(iii)(a) It is not necessary for the petitioner to request a fitness-to-proceed examination if fitness to proceed does not appear to be an issue.

(b) An examiner shall not render an opinion or issue a report on criminal responsibility if the examiner believes that the defendant is not fit to proceed.

(c) In a case under subdivision (a)(1)(A)(iii)(b) of this section, the criminal responsibility examination shall be suspended and the court notified immediately that there is a question as to the defendant's fitness to proceed; or

(B)(i) Any party or the court raises the issue of the defendant's fitness to proceed.

(ii) The court shall order a fitness-to-proceed examination if it finds there is a reasonable suspicion that a defendant is not fit to proceed.

(2)(A) The fitness-to-proceed examination, and the criminal responsibility examination and request for an opinion on the defendant's criminal responsibility, are two distinctly different examinations.

(B) The fitness-to-proceed examination and the criminal responsibility examination may be done at the same time only if the defendant simultaneously raises the issue of the defendant's fitness to proceed and files notice that he or she intends to rely upon the defense of mental disease or defect.

(C) In all other cases the process is bifurcated.

(3)(A) A defendant shall not be found not guilty by reason of mental disease or defect in the absence of proof of a mental disease or defect.

(B) A court shall not order the Division of Behavioral Health Services of the Department of Human Services to conduct a criminal responsibility examination if a fitness-to-proceed examination has previously determined that the defendant does not have a mental



disease or defect unless the requesting party can show reasonable cause to believe:

(i) There is evidence of a mental disease or defect that was not fully considered in the previous criminal responsibility examination; or

(ii) That the prior opinion that the defendant does not have a mental disease or defect was based on information or facts later shown to be false or unreliable.

(4)(A) If a trial jury has been impaneled and the court suspends proceedings under subdivision (a)(1) of this section, the court may retain the jury or declare a mistrial and discharge the jury.

(B) A discharge of the trial jury is not a bar to further prosecution.

(b)(1) Upon suspension of further proceedings in the prosecution, the court shall enter an order:

(A) Directing that the defendant undergo examination and observation by one (1) or more qualified psychiatrists or qualified psychologists;

(B) Appointing one (1) or more qualified psychiatrists not practicing within the Arkansas State Hospital to make an examination and report on the mental condition of the defendant; or

(C) Directing the Director of the Division of Behavioral Health Services of the Department of Human Services to determine who will examine and report upon the mental condition of the defendant.

(2) The Director of the Division of Behavioral Health Services of the Department of Human Services or his or her designee shall determine the location of the examination.

(3) The examination shall be for a period not exceeding sixty (60) days or such longer period as the Director of the Division of Behavioral Health Services of the Department of Human Services or his or her designee determines to be necessary for the purpose of the examination.

(4)(A)(i) Two (2) distinctly different uniform evaluation orders shall be developed by the Administrative Office of the Courts, the office of the Prosecutor Coordinator, the Department of Human Services, and the Arkansas Public Defender Commission. One (1) uniform evaluation order shall be for a fitness-to-proceed examination and opinion and the other uniform evaluation order shall be for a criminal responsibility examination and opinion.

(ii) At a minimum the uniform examination orders shall contain the:

(a) Defendant's name, age, gender, and race;

(b) Charges pending against the defendant;

(c) Defendant's attorney's name and address;

(d) Defendant's custody status;

(e) Case number;

(f) A unique identifying number on the incident reporting form as required by the Arkansas Crime Information Center; and

(g) The name of the requesting attorney.

(iii) The uniform evaluation order shall be utilized any time that a defendant is ordered to be examined by the court pursuant to this

section, and a copy of the uniform evaluation order shall be forwarded to the Director of the Department of Human Services or his or her designee.

(iv) No examination under this subchapter shall be conducted without using a uniform evaluation order.

(v) Fitness-to-proceed and criminal responsibility examination orders may be ordered at the same time in accordance with subdivision (a)(1) of this section, but they may not be combined into one (1) uniform evaluation order and shall be tracked separately by the Division of Behavioral Health Services of the Department of Human Services.

(B)(i) The Division of Behavioral Health Services of the Department of Human Services shall maintain a database of all examinations of defendants performed pursuant to this subchapter.

(ii) The database shall be maintained in a manner to enable it to generate reports and data compilations either with or without personal identifying information.

(iii) At a minimum the database shall contain:

(a) The information on the uniform evaluation order as provided in subdivision (b)(4)(A)(ii) of this section;

(b) The name of the judge that ordered the examination, if known;

(c) The name of the attorney that requested the examination, if known;

(d) The name of the examiner that conducted the examination;

(e) The result of the examination;

(f) If the defendant is found not fit to proceed, whether the defendant was restored to fitness to proceed; and

(g) If the defendant is found not guilty by reason of mental disease or defect, the defendant's progress through his or her commitment and conditional release.

(iv) The database should be designed in a manner that allows reports to be generated for the General Assembly, researchers, and the public to track the efficiency and effectiveness of the examination process and the restoration and treatment programs of the Division of Behavioral Health Services of the Department of Human Services without invading the privacy of individual defendants and patients.

(c)(1) Upon completion of an examination pursuant to subsection (b) of this section, the court may enter an order providing for further examination and may order the defendant committed to the Arkansas State Hospital or other appropriate facility for further examination and observation if the court determines that commitment and further examination and observation are warranted.

(2) When the defendant has previously been found fit to proceed, the court may order a second or subsequent examination to determine a defendant's fitness to proceed only if the court:

(A) Finds reasonable cause to believe that new or previously undiscovered evidence calls into question the factual, legal, or scientific basis of the opinion upon which the previous finding of fitness relied;



(B) Finds reasonable cause to believe that the defendant's mental condition has changed; or

(C) Sets forth in the order a factual or legal basis upon which to order another examination.

(d)(1) An examiner's report under this subchapter shall include:

(A) A description of the nature of the examination;

(B) A description of any evidence that the defendant is feigning a sign or symptom of mental disease or defect;

(C) A specific description of the signs or symptoms of mental disease or defect if in the opinion of the examiner the defendant has a mental disease or defect; and

(D) A substantiated diagnosis in the terminology of the American Psychiatric Association's current edition of the Diagnostic and Statistical Manual of Mental Disorders.

(2) In addition to the information in subdivision (d)(1) of this section, a report of a fitness-to-proceed examination shall specifically include an opinion on whether the defendant lacks the capacity to understand the proceedings against him or her and to assist effectively in his or her own defense as a consequence of mental disease or defect and an explanation of the examiner's opinion and the basis of the opinion.

(3) In addition to the information in subdivision (d)(1) of this section, a report of a criminal responsibility examination shall include the following:

(A) An opinion as to whether as the result of a mental disease or defect the defendant at the time of the alleged criminal conduct lacked the capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law and an explanation of the examiner's opinion and the basis of the opinion; and

(B) When directed by the court, an opinion as to the capacity of the defendant to have the culpable mental state that is required to establish an element of the offense charged with an explanation of the examiner's opinion and the basis of the opinion.

(e) If an examination cannot be conducted because of the unwillingness of the defendant to participate in the examination, the report of the examination shall so state and shall include, if possible, an opinion as to whether the unwillingness of the defendant is the result of mental disease or defect.

(f)(1) A person designated to perform an examination shall file the report of the examination with the clerk of the court, and the clerk of the court shall mail a copy to the defense attorney and a copy to the prosecuting attorney.

(2) Upon entry of an order by a circuit court, a copy of the report of the examination concerning a defendant shall be provided to the circuit court by the person designated to perform the examination.

(g)(1) Notwithstanding the provision of any statute enacted prior to January 1, 1976, any existing medical or pertinent record in the custody of a public agency shall be made available to the examiner and to the

prosecuting attorney and the defendant's attorney for inspection and copying.

(2) The court shall require the prosecuting attorney to provide to the examiner any information relevant to the examination, including, but not limited to:

(A) The name and address of any attorney involved in the matter;

(B) Information about the alleged offense; and

(C) Any information about the defendant's background that is deemed relevant to the examination, including the criminal history of the defendant.

(3) The court may require the attorney for the defendant to provide any available information relevant to the examination, including, but not limited to, a:

(A) Psychiatric record;

(B) Medical record; or

(C) Record pertaining to treatment of the defendant for substance or alcohol abuse.

(h)(1) When an examination of a defendant has been completed, the county from which the defendant had been sent for the examination shall procure the defendant within three (3) working days from the Arkansas State Hospital or from a designated receiving facility or program or other facility where the examination was performed.

(2) If the county fails to procure the defendant within this three-day period, the county shall bear any room or board costs on the fourth and subsequent days.

(i) A person under commitment and supervision of the Department of Correction who is a defendant charged in circuit court shall not undergo an examination or observation conducted by a psychiatrist or other mental health employee of the Department of Correction to determine the mental condition of the defendant.

(j)(1) A person or entity that provides treatment under this subchapter may impose a charge for the cost of the treatment.

(2) A charge for costs under subdivision (j)(1) of this section may not exceed the actual cost of the treatment.

(3)(A) The Division of Behavioral Health Services of the Department of Human Services shall promulgate rules establishing reasonable charges for costs of treatment under this subchapter.

(B) Rules establishing reasonable charges for costs of treatment under this subchapter shall:

(i) Provide for postponing the collection of the charges based on clinical considerations or the patient's inability to pay, or both; and

(ii) Waive charges for treatment of defendants who plead guilty or nolo contendere or are found guilty at trial.

(k) An examination report required to be filed with the clerk of the court under this subchapter is a public record.

(l) This subchapter does not preclude the defendant from having a fitness-to-proceed examination or a criminal responsibility examination conducted by a defense expert or from maintaining the defense of not



guilty by reason of mental disease or defect using testimony from a defense expert or other evidence.

**History.** Acts 1975, No. 280, § 605; 1977, No. 360, § 2; 1979, No. 886, § 1; 1983, No. 191, § 3; A.S.A. 1947, § 41-605; Acts 1989, No. 645, §§ 5, 6; 1989, No. 898, § 1; 1989, No. 911, §§ 5, 6; 1995, No. 767, § 3; 2001, No. 1554, § 3; 2011, No. 991, §§ 1, 2, 3; 2013, No. 506, § 1.

**Amendments.** The 2011 amendment rewrote (d)(1)(E); deleted former (h)(1) and (h)(2)(A) and redesignated the remaining subdivisions accordingly; and added (j).

The 2013 amendment rewrote the section.

## CASE NOTES

### ANALYSIS

Compliance with Section.  
Examination Report.  
Mental Fitness at Issue.  
Request or Motion for Examination.

#### Compliance with Section.

Defendant's conviction for breaking or entering was proper because the trial court did not err in failing to suspend the proceedings sua sponte and order a second competency hearing based on his actions shortly before and during trial. In part, although defendant appeared to have required restraint at trial because he would stand at inappropriate times, and he asserted that he did not understand the proceedings, those behaviors were entirely consistent with those observed during the videotaped interview following his arrest, after which defendant underwent a psychological examination. *Vilayvanh v. State*, 2012 Ark. App. 561, — S.W.3d — (2012).

#### Examination Report.

Denial of the inmate's petition for post-conviction relief under Ark. R. Crim. P. 37.1 was improper as to the competency issue because the supreme court was unable to determine whether there were any results of the mental evaluation of which the parties or the court might have been made aware, whether those results were contested, or whether there was any other resolution settling the issue of the inmate's competency to proceed and enter his plea. *Sandoval-Vega v. State*, 2011 Ark. 393, 384 S.W.3d 508 (2011).

#### Mental Fitness at Issue.

Trial court did not err in denying defendant's request for a mental evaluation where there was no evidence to suggest

that he lacked an appreciation for the seriousness of the charges against him or an ability to assist his attorney in his defense, and the trial court found him fit to proceed. *Bryant v. State*, 94 Ark. App. 387, 231 S.W.3d 91 (2006).

Pursuant to defense counsel's motion, the court suspended defendant's trial for a mental-health evaluation and a doctor determined that defendant demonstrated a fully-developed, persecutory-type delusion; however, once defendant's fitness was restored, his prosecution for attempting to commit capital murder could proceed and the court was not required to order a second evaluation when defendant later claimed he was hearing voices. *Steward v. State*, 95 Ark. App. 6, 233 S.W.3d 180 (2006).

#### Request or Motion for Examination.

In a rape case, requests for a continuance under Ark. R. Crim. P. 27.3 and for the appointment of additional experts were properly denied because a court-ordered mental evaluation complied with subsection (d) of this section, defendant had several months to secure a deoxyribonucleic acid expert, and it was unlikely that he could have procured an alibi witness. *Creed v. State*, 372 Ark. 221, 273 S.W.3d 494 (2008), rehearing denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 157 (Mar. 6, 2008), cert. denied, *Creed v. State*, — U.S. —, 129 S. Ct. 130, 172 L. Ed. 2d 37 (2008).

Trial court's denial of defendant's request for a mental-health evaluation was proper because the appellate court was faced with only a secondhand count of defendant's mental state, no explanation for the delay in filing the motion, and the knowledge that defense counsel had needed more time due to scheduling con-

flicts. *Holden v. State*, 104 Ark. App. 5, 289 S.W.3d 125 (2008), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 501 (Jan. 30, 2009).

**Cited:** *Jimenez v. State*, 2010 Ark. App. 805, 379 S.W.3d 762 (2010).

## 5-2-309. Determination of fitness to proceed.

### CASE NOTES

#### ANALYSIS

Duty to Decide Fitness.  
Hearing.

#### **Duty to Decide Fitness.**

Although defendant raised the issue of his lack of capacity at the time of the alleged offenses due to mental disease or defect, as well as the issue of his mental retardation for purposes of applying the death penalty, these were two issues separate and distinct from the issue of capacity to stand trial. Because defendant's competency to stand trial was never in dispute, and because defendant acknowledged his

competency at trial, the trial court did not err in failing to rule on defendant's competency. *Miller v. State*, 2010 Ark. 1, 362 S.W.3d 264 (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 95 (Feb. 12, 2010).

#### **Hearing.**

Trial court was not obligated to hold a hearing on the issue of competency to stand trial where two mental evaluations concluded that defendant was fit to stand trial and was not impaired by mental defect, and the findings were not contested by either party. *Weston v. State*, 366 Ark. 265, 234 S.W.3d 848 (2006).

## 5-2-310. Lack of fitness to proceed — Procedures subsequent to finding.

(a)(1)(A) If the court determines that a defendant lacks fitness to proceed, the proceeding against him or her shall be suspended and the court may commit the defendant to the custody of the Department of Human Services for detention, care, and treatment until restoration of fitness to proceed.

(B) However, if the court is satisfied that the defendant may be released without danger to himself or herself or to the person or property of another, the court may order the defendant's release and the release shall continue at the discretion of the court on conditions the court determines necessary.

(2) A copy of the report filed pursuant to § 5-2-305 shall be attached to the order of commitment or order of conditional release.

(b)(1) Within a reasonable period of time, but in any case within ten (10) months of a commitment pursuant to subsection (a) of this section, the department shall file with the committing court a written report indicating whether the defendant is fit to proceed, or if not, whether:

(A) The defendant's mental disease or defect is of a nature precluding restoration of fitness to proceed; and

(B) The defendant presents a danger to himself or herself or to the person or property of another.

(2)(A) The court shall make a determination within one (1) year of a commitment pursuant to subsection (a) of this section.



(B) Pursuant to the report of the department or as a result of a hearing on the report, if the court determines that the defendant is fit to proceed, prosecution in ordinary course may commence.

(C) If the defendant lacks fitness to proceed but does not present a danger to himself or herself or to the person or property of another, the court may release the defendant on conditions the court determines to be proper.

(D) If the defendant lacks fitness to proceed and presents a danger to himself or herself or the person or property of another, the court shall order the department to petition for an involuntary admission.

(E) Upon filing of an order finding that the defendant lacks fitness to proceed issued under subdivision (b)(2)(A) of this section with a circuit clerk or a probate clerk, the circuit clerk or the probate clerk shall submit a copy of the order to the Arkansas Crime Information Center.

(c)(1) On the court's own motion or upon application of the department, the prosecuting attorney, or the defendant, and after a hearing if a hearing is requested, if the court determines that the defendant has regained fitness to proceed, the criminal proceeding shall be resumed.

(2) However, if the court is of the view that so much time has elapsed since the alleged commission of the offense in question that it would be unjust to resume the criminal proceeding, the court may dismiss the charge.

**History.** Acts 1975, No. 280, § 607; § 1; No. 911, § 1; 2007, No. 463, § 1; A.S.A. 1947, § 41-607; Acts 1989, No. 645, 2007, No. 568, § 1.

## CASE NOTES

### ANALYSIS

Length of Detention.

Suspension of Proceedings.

#### Length of Detention.

Where a pretrial detainee who suffered from acute psychosis died after he was returned to jail because there was no available hospital bed, his right to be free from deliberate indifference on the part of the county sheriffs was not violated as the detention at issue was less than five days. *Winters v. Ark. HHS*, 437 F. Supp. 2d 851 (E.D. Ark. 2006), *aff'd*, 491 F.3d 933, 2007 U.S. App. LEXIS 15486 (8th Cir. Ark. 2007).

#### Suspension of Proceedings.

Where doctor determined that defendant demonstrated a fully-developed, persecutory-type delusion, the court suspended defendant's trial for attempting to commit capital murder, however, the proceedings commenced when two doctors testified that defendant did not lack the capacity to understand the proceedings against him and to assist effectively in his own defense; further, an additional mental-health evaluation was not warranted when defendant later claimed he was hearing voices. *Steward v. State*, 95 Ark. App. 6, 233 S.W.3d 180 (2006).

## 5-2-312. Lack of capacity — Affirmative defense.

### RESEARCH REFERENCES

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

### CASE NOTES

#### ANALYSIS

Applicability.  
Burden of Proof.  
Mental Disease or Defect.

#### Applicability.

Although defendant raised the issue of his lack of capacity at the time of the alleged offenses due to mental disease or defect, as well as the issue of his mental retardation for purposes of applying the death penalty, these were two issues separate and distinct from the issue of capacity to stand trial. Because defendant's competency to stand trial was never in dispute, and because defendant acknowledged his competency at trial, the trial court did not err in failing to rule on defendant's competency. *Miller v. State*, 2010 Ark. 1, 362 S.W.3d 264 (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 95 (Feb. 12, 2010).

#### Burden of Proof.

In a murder case, defendant failed to prove his defense of mental disease or defect because the state's expert testified that defendant showed no signs of significant cognitive impairment or active psychiatric disease. She diagnosed defendant with alcohol dependence and marijuana dependence, neither of which constituted

a mental disease. *Navarro v. State*, 371 Ark. 179, 264 S.W.3d 530 (2007).

During an inmate's trial for murder, the jury was entitled to believe the testimony of the State's expert over the inmate's experts and to decide that the inmate had not proved the defense of mental disease or defect by a preponderance of the evidence. *Kaufman v. State*, 2013 Ark. 126, — S.W.3d — (2013).

#### Mental Disease or Defect.

In a prosecution for capital murder, as defendant failed to move for a directed verdict on the basis of the affirmative defense of mental disease or defect, that issue was not preserved for review. *Marczyniuk v. State*, 2010 Ark. 257, 373 S.W.3d 243 (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 402 (Aug. 6, 2010).

Appellant's convictions for second-degree murder and first-degree battery were affirmed because the jury was free to give credit to the forensic psychologist's testimony that appellant had no mental illness, or that he was able in any event to appreciate the criminality of his conduct and to conform his conduct in accordance with the law. *Lands v. State*, 2012 Ark. App. 616, — S.W.3d —, 2012 Ark. App. LEXIS 720 (Oct. 31, 2012).

**Cited:** *Adams v. State*, 2013 Ark. 174, — S.W.3d — (2013).

## 5-2-313. Acquittal based on mental health report.

### CASE NOTES

#### Civil Commitment.

By entering a plea of not guilty by reason of mental disease or defect, defendant conceded that he engaged in the conduct charged; because he availed him-

self of the procedure afforded under § 5-2-313, defendant's due-process rights were not violated. *Ark. Dep't of Corr. v. Bailey*, 368 Ark. 518, 247 S.W.3d 851 (2007).



**5-2-314. Acquittal — Examination of defendant — Hearing.**

(a) When a defendant is acquitted on the ground of mental disease or defect, a circuit court is required to determine and to include the determination in the order of acquittal one (1) of the following:

(1) The offense involved bodily injury to another person or serious damage to the property of another person or involved a substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant remains affected by mental disease or defect;

(2) The offense involved bodily injury to another person or serious damage to the property of another person or involved a substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant is no longer affected by mental disease or defect;

(3) The offense did not involve bodily injury to another person or serious damage to the property of another person nor did it involve substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant remains affected by mental disease or defect; or

(4) The offense did not involve bodily injury to another person or serious damage to the property of another person nor did it involve a substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant is no longer affected by mental disease or defect.

(b)(1) If the circuit court enters a determination based on subdivision (a)(1) or (3) of this section, the circuit court shall order the defendant committed to the custody of the Department of Human Services for an examination by a psychiatrist or a licensed psychologist.

(2) Upon filing of an order of commitment under subdivision (b)(1) of this section with a circuit clerk, the circuit clerk shall submit a copy of the order to the Arkansas Crime Information Center.

(c) If the circuit court enters a determination based on subdivision (a)(2) or (4) of this section, the circuit court shall immediately discharge the defendant.

(d)(1)(A) The department shall file the psychiatric or psychological report with the probate clerk of the circuit court having venue within thirty (30) days following receipt of an order of acquittal.

(B) If before thirty (30) days the department makes application to the circuit court for an extension of time to file the psychiatric or psychological report and the circuit court finds there is good cause for the delay, the circuit court may order that additional time be allowed for the department to file the psychiatric or psychological report.

(C) A hearing shall be conducted by the circuit court and shall take place not later than ten (10) days following the filing of the psychiatric or psychological report with the circuit court.

(2) If the psychiatric or psychological report is not filed within thirty (30) days following the department's receipt of an order of acquittal or

within such additional time as authorized by the circuit court, the circuit court may grant a petition for a writ of habeas corpus ordering the release of the defendant under terms and conditions that are reasonable and just for the defendant and societal concerns about the safety of persons and property of others.

(e)(1) A person found not guilty on the ground of mental disease or defect of an offense involving bodily injury to another person or serious damage to the property of another person or involving a substantial risk of bodily injury to another person or serious damage to the property of another person has the burden of proving by clear and convincing evidence that his or her release would not create a substantial risk of bodily injury to another person or serious damage to property of another person due to a present mental disease or defect.

(2) With respect to any other offense, the person has the burden of proof by a preponderance of the evidence.

(f)(1) A person acquitted whose mental condition is the subject of a hearing has a right to counsel.

(2)(A) If it appears to the circuit court that the person acquitted is in need of counsel, an attorney shall be appointed immediately upon filing of the original petition.

(B)(i) When an attorney is appointed by the circuit court, the circuit court shall determine the amount of the fee to be paid the attorney appointed by the circuit court and issue an order of payment.

(ii) The amount of the fee allowed shall be based upon the time and effort of the attorney in the investigation, preparation, and representation of the client at the court hearings.

(g)(1) The quorum court of each county shall appropriate funds for the purpose of payment of the attorney's fees provided for by subsection (f) of this section.

(2) Upon presentment of a claim accompanied by an order of the circuit court fixing the fee, the claim shall be approved by the county court and paid in the same manner as other claims against the county are paid.

(h) A hearing conducted pursuant to subsection (d) of this section may be held at the Arkansas State Hospital or a designated receiving facility or program where the person acquitted is detained.

(i) When conducting any hearing set out in this section, the circuit judge may conduct the hearing within any county of his or her judicial district.

(j)(1)(A) It is the duty of the prosecuting attorney's office in the county where the petition is filed to represent the State of Arkansas at any hearing held pursuant to this section except a hearing pending at the Arkansas State Hospital in Pulaski County.

(B) A prosecuting attorney may contract with another attorney to provide services under subdivision (j)(1) of this section.

(2) The office of the Prosecutor Coordinator shall appear for and on behalf of the State of Arkansas at the Arkansas State Hospital in Little Rock.



(3) Representation under this subsection is a part of the official duties of a prosecuting attorney or the office of the Prosecutor Coordinator and the prosecuting attorney or the office of the Prosecutor Coordinator is immune from civil liability in the performance of this official duty.

**History.** Acts 1989, No. 645, § 3; No. 2003, No. 1185, § 3; 2005, No. 1446, § 1; 821, § 1; No. 911, § 3; 1995, No. 609, § 1; 2007, No. 463, § 2; 2007, No. 568, § 3.

RESEARCH REFERENCES

**ALR.** Extended Commitment of One of Acquittal of Crime on Ground of Insanity Committed to Institution as Consequence 52 A.L.R.6th 567.

5-2-315. Discharge or conditional release.

(a)(1)(A) When the Director of the Department of Human Services or his or her designee determines that a person acquitted has recovered from his or her mental disease or defect to such an extent that his or her release or his or her conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to the property of another person, the director shall promptly file an application for discharge or conditional release of the person acquitted with the circuit court that ordered the commitment.

(B) In addition, if the person acquitted has an impairment due to alcohol or substance abuse, the director may petition the circuit court for involuntary commitment under § 20-64-815.

(2) The director shall send a copy of the application to the counsel for the person acquitted and to the attorney for the state.

(b)(1) Within twenty (20) days after receiving the application for discharge or conditional release of the person acquitted, the attorney for the state may petition the circuit court for a hearing to determine whether the person acquitted should be released.

(2) If the attorney for the state does not request a hearing, the circuit court may conduct a hearing on its own motion or discharge the person acquitted.

(c) If the circuit court finds after a hearing under subsection (b) of this section by the standard specified in § 5-2-314(e) that the person acquitted has recovered from his or her mental disease or defect to such an extent that:

(1) The discharge of the person acquitted would no longer create a substantial risk of bodily injury to another person or serious damage to property of another person, then the circuit court shall order that the person acquitted be immediately discharged; or

(2) The conditional release of the person acquitted under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to

another person or serious damage to property of another person, then the circuit court shall order:

(A) That the person acquitted be conditionally released under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been:

- (i) Prepared for the person acquitted;
  - (ii) Certified to the circuit court as appropriate by the director of the facility in which the person acquitted is committed; and
  - (iii) Found by the circuit court to be appropriate; and
- (B) Explicit conditions of release, including without limitation requirements that:

(i) The person acquitted comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment;

(ii) The person acquitted be subject to regularly scheduled personal contact with a compliance monitor for the purpose of verifying compliance with the conditions of release;

(iii) Compliance with the conditions of release be documented with the circuit court by the compliance monitor at ninety-day intervals or at such intervals as the circuit court may order; and

(iv) Impose the conditions of release for a period of up to five (5) years.

(d) If the circuit court determines that the person acquitted has not met his or her burden of proof under subsection (c) of this section, the person acquitted shall continue to be committed to the custody of the Department of Human Services.

(e) A person ordered to be in charge of a prescribed regimen of medical, psychiatric, or psychological care or treatment of a person acquitted shall provide:

(1) The prescribed regimen of medical, psychiatric, or psychological care or treatment;

(2) Periodic written documentation to a compliance monitor of compliance with the conditions of release, including, but not limited to, documentation of compliance with the prescribed:

(A) Medication;

(B) Treatment and therapy;

(C) Substance abuse treatment; and

(D) Drug testing; and

(3)(A) Written notice of any failure of the person acquitted to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment to the:

(i) Compliance monitor;

(ii) Attorney for the person acquitted;

(iii) Attorney for the state; and

(iv) Circuit court having jurisdiction.

(B) The written notice under subdivision (e)(3)(A) of this section shall be provided immediately upon the failure of the person acquitted to comply with a condition of release.

(C)(i) Upon the written notice under subdivision (e)(3)(A) of this section or upon other probable cause to believe that the person



acquitted has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person acquitted may be detained and shall be taken without unnecessary delay before the circuit court having jurisdiction over him or her.

(ii) After a hearing, the circuit court shall determine whether the person acquitted should be remanded to an appropriate facility on the ground that, in light of his or her failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his or her continued release would create a substantial risk of bodily injury to another person or serious damage to property of another person.

(D) At any time after a hearing employing the same criteria, the circuit court may modify or eliminate the prescribed regimen of medical, psychiatric, or psychological care or treatment.

(f)(1) Regardless of whether the director or his or her designee has filed an application pursuant to a provision of subsection (a) of this section, and at any time during the commitment of the person acquitted, a person acquitted, his or her counsel, or his or her legal guardian may file with the circuit court that ordered the commitment a motion for a hearing to determine whether the person acquitted should be discharged from the facility in which the person acquitted is committed.

(2) However, no motion under subdivision (f)(1) of this section may be filed more than one (1) time every one hundred eighty (180) days.

(3) A copy of the motion under subdivision (f)(1) of this section shall be sent to the:

(A) Director of the facility in which the person acquitted is committed; and

(B) Attorney for the state.

**History.** Acts 1989, No. 645, § 4; 1989, No. 911, § 4; 1995, No. 609, § 2; 1995, No. 767, § 4; 1997, No. 922, § 2; 2011, No. 990, § 1.

**Amendments.** The 2011 amendment inserted “including without limitation requirements” in (c)(2)(B); and added (c)(2)(B)(iv).

### **5-2-316. Conditional release — Subsequent discharge, modification, or revocation.**

(a)(1) The Director of the Department of Human Services or his or her designee or a person conditionally released under § 5-2-315, or both, may apply to the court ordering the conditional release for discharge from or modification of the order granting conditional release on the ground that the person conditionally released under § 5-2-315 may be discharged or the order modified without danger to the person conditionally released under § 5-2-315 or to the person or property of another person.

(2) The application shall be accompanied by a supporting affidavit of a qualified physician.

(3) A copy of the application and affidavit shall be transmitted to the prosecuting attorney of the judicial circuit from which the person was conditionally released and to any person supervising his or her release,

and the hearing on the application shall be held following notice to the prosecuting attorney and the person supervising his or her release.

(4) On its own motion or on the motion of a party, a court shall dismiss an application made under this section if the court determines that the application is frivolous or repetitive.

(b)(1) After notice to the conditionally released person and a hearing, the court may determine that the conditionally released person has violated a condition of release or that for the safety of the conditionally released person or for the safety of the person or property of another person the conditional release should be modified, extended for a period specified by the court not to exceed five (5) years, or revoked.

(2)(A) If an order is entered revoking the most recent order of conditional release under subdivision (b)(1) of this section, all conditions of the release shall be abated, and the person shall be ordered to be committed to the custody of the director or the director's designee.

(B) After the revocation described in subdivision (b)(2)(A) of this section, the person is subject to future discharge or conditional release only under the procedure prescribed in § 5-2-315.

**History.** Acts 1975, No. 280, § 614; A.S.A. 1947, § 41-614; Acts 1997, No. 922, § 3; 2007, No. 623, § 1; 2011, No. 990, § 2; 2013, No. 981, § 3; 2013, No. 1125, § 1.

**Amendments.** The 2011 amendment, in (a)(1), substituted "the director of the Department of Human Services or his or her designee, or a" for "any" and "under § 5-2-314, or both" for "pursuant to § 5-2-314 or § 5-2-315"; in (b)(1), deleted "within five (5) years after the most recent order of conditional release is issued pursuant to § 5-2-314 or § 5-2-315 and" preceding "after notice," inserted "person" following "another," and substituted

"modified, extended for a period specified by the court not to exceed five (5) years, or revoked" for "modified or revoked"; in (b)(2)(A), deleted "including the five-year conditional release time frame in subdivision (b)(1) of this section" following "abated" and "of the Department of Human Services" following "director"; and inserted "conditional" in (b)(2)(B).

The 2013 amendment by No. 981 inserted (a)(4).

The 2013 amendment by No. 1125, in (a)(1), substituted "the person conditionally released under § 5-2-315" for "he or she" and for "himself or herself."

## CASE NOTES

### Jurisdiction.

Circuit court did not lack jurisdiction in 2006 to consider a petition for the conditional release of a state hospital patient who had been the subject of an initial conditional-release order in 1993 because

this section, even prior to clarifying amendments made in 2007, could not properly be read as automatically depriving the court of jurisdiction 5 years after an initial order. *State v. Owens*, 370 Ark. 421, 260 S.W.3d 288 (2007).

### 5-2-326. Restraint of an Arkansas State Hospital patient.

(a) If necessary for security, an Arkansas State Hospital patient shall be physically restrained with a restraint while being transported to locations away from hospital grounds or to and from any court appearance.



(b) A patient shall not be physically restrained with a restraint if the restraint is medically contraindicated.

(c) The restraint shall be implemented in accordance with safe and appropriate restraint techniques as determined by hospital policy.

(d) The restraint used shall be the least restrictive type or technique necessary to effectively protect the patient, staff members, or others from harm.

(e) The restraint shall not be used as a means of coercion, discipline, convenience, or retaliation by staff.

**History.** Acts 2007, No. 636, § 2.

## SUBCHAPTER 4 — PARTIES TO OFFENSES

### 5-2-401. Criminal liability generally.

#### CASE NOTES

##### ANALYSIS

Application.  
Evidence.  
Participation.

##### Application.

Defendant's conviction for capital murder, in violation of § 5-10-101(a)(4), was proper because there was substantial evidence that defendant was guilty as an accomplice pursuant to this section and §§ 5-2-402(2) and 5-2-403(b)(1), (2), and his argument that there was insufficient evidence of his acting as an accomplice by encouraging, aiding, or assisting the killer in stabbing the victim, was not preserved for review. *Lawshea v. State*, 2009 Ark. 600, 357 S.W.3d 901 (2009).

##### Evidence.

Defendant's conviction for capital murder was supported by substantial evidence where he served as an accomplice to the murder by directing his brother to "come on down" from the attic because the victim moved, suggesting that his brother needed to finish killing the victim, which he did while defendant watched. *Wilson v. State*, 365 Ark. 664, 232 S.W.3d 455 (2006).

##### Participation.

Under accomplice liability, a person may commit an offense by his own conduct or by that of another person. *Wilson v. State*, 365 Ark. 664, 232 S.W.3d 455 (2006).

### 5-2-402. Liability for conduct of another generally.

#### CASE NOTES

##### ANALYSIS

Accomplices.  
Evidence.

##### Accomplices.

Person is criminally liable for the conduct of another person when he is the accomplice of another person in the commission of an offense. *Wilson v. State*, 365 Ark. 664, 232 S.W.3d 455 (2006).

Defendant's conviction for capital murder, in violation of § 5-10-101(a)(4), was

proper because there was substantial evidence that defendant was guilty as an accomplice pursuant to §§ 5-2-401, 5-2-403(b)(1), (2), and subdivision (2) of this section, and his argument that there was insufficient evidence of his acting as an accomplice by encouraging, aiding, or assisting the killer in stabbing the victim, was not preserved for review. *Lawshea v. State*, 2009 Ark. 600, 357 S.W.3d 901 (2009).

Substantial evidence supported defen-

dant's convictions for aggravated robbery, kidnapping, aggravated assault, theft of property, unlawful discharge of a firearm from a vehicle, and fleeing because while the state did not prove that defendant actually entered a bank, it did provide substantial evidence that he was the driver of the getaway car and thus was an accomplice of the two men who committed the aggravated robbery, kidnapping, and theft of property; while defendant did not personally shoot at an officer's vehicle, his conduct of driving the fleeing vehicle while another person in the car fired the shots sufficiently implicated him as an accomplice to unlawfully discharging a firearm from a vehicle. *Barber v. State*, 2010 Ark. App. 210, 374 S.W.3d 709 (2010).

### **Evidence.**

Evidence was sufficient to convict defendant of first degree murder and theft where, in addition to the testimony of defendant's wife, who was an accomplice, defendant's own statements to the police, his conduct before and after the crime, and statements of the victim's friends regarding her fear of defendant tended to connect him to the crimes; further, although there was no evidence that defendant ever drove victim's Cadillac or had the vehicle in his possession, the jury might have determined that defendant facilitated the theft by leaving the accomplice without a vehicle at the victim's house, and there was evidence that the theft of the Cadillac was part of the plan to murder the victim. *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006).

Defendant's conviction for capital murder was supported by substantial evidence where he served as an accomplice to the murder by directing his brother to "come on down" from the attic because the victim moved, suggesting that his brother needed to finish killing the victim, which he did while defendant watched. *Wilson v. State*, 365 Ark. 664, 232 S.W.3d 455 (2006).

Defendant's convictions for two counts of aggravated robbery were proper because a neighbor verified that one of the intruders had a gun; the victim told officers that the intruders hid their guns in the closet, where two guns were found; and both intruders were charged in the same instrument, implicating accomplice

liability, under subdivision (2) of this section. That provided substantial evidence to support the finding that the intruders at minimum represented by word or conduct that they were armed as a threat in order to commit the theft. *Hinton v. State*, 2010 Ark. App. 341, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 516 (June 2, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 399 (Aug. 6, 2010).

Defendant's convictions for two counts of aggravated burglary were proper because defendant's argument that there was no direct proof on the record of defendant holding a gun was without merit since substantial circumstantial evidence supported a finding of guilt, either as a principal or an accomplice, as defined in subdivision (2) of this section. A neighbor verified that one of the intruders had a gun, the victim told the officers that the intruders hid their guns in the closet, where two guns were found, and both intruders were charged in the same instrument, implicating accomplice liability; that provided substantial evidence supporting the finding that the intruders at minimum represented by word or conduct that they were armed as a threat. *Hinton v. State*, 2010 Ark. App. 341, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 516 (June 2, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 399 (Aug. 6, 2010).

Defendant's convictions for breaking or entering, in violation of § 5-39-202(1), and theft of property, in violation of § 5-36-103(a)(1), were supported by the evidence because defendant's unlawful presence near a storage shed, flight from the victim, and association with persons involved in the crimes suggested that defendant jointly participated in the crimes under subdivision (a)(2) of this section. *Goforth v. State*, 2010 Ark. App. 735, — S.W.3d — (2010).

Trial court did not err in denying defendant's motion for a directed verdict during a trial for first-degree murder as an accomplice, in violation of subsection (2) of this section, because a codefendant testified that defendant hired the codefendant to murder his wife; the state presented the testimony of five witnesses concerning the fear of defendant's wife that he would kill



her. *Camp v. State*, 2011 Ark. 155, 381 S.W.3d 11 (2011).

Substantial evidence supported a juvenile's second-degree battery disposition based on accomplice liability under subsection (2) of this section because a codefendant testified that the juvenile solicited and encouraged the plan to beat her

boyfriend, who she suspected of cheating; the juvenile could be found guilty of the conduct of her accomplices who threw the punches. *L.C. v. State*, 2012 Ark. App. 666, — S.W.3d —, 2012 Ark. App. LEXIS 782 (Nov. 28, 2012).

**Cited:** *Ramsey v. State*, 2010 Ark. App. 836, 378 S.W.3d 797 (2010).

## 5-2-403. Accomplices.

### CASE NOTES

#### ANALYSIS

Accomplice Testimony.

Evidence.

Instructions.

Liability.

Testimony.

#### Accomplice Testimony.

Where defendant's friend testified that defendant tried to rob the victim in his truck and shot him when he resisted, defendant's fingerprints were found on the truck and the blood on the gun matched defendant's DNA. Even if the friend was deemed an accomplice for purposes of this section, the evidence was sufficient to connect defendant to the offense. *Bush v. State*, 374 Ark. 506, 288 S.W.3d 658 (2008).

#### Evidence.

Defendant's conviction for theft by receiving was proper as the evidence established that his companion was in the store where the victim worked around the time that her credit card was stolen, defendant presented that credit card at a gas station a short time later, and defendant and his companion tried to purchase over \$100 in merchandise; the state provided sufficient evidence to prove that defendant was at least an accomplice in the crime. *Henson v. State*, 94 Ark. App. 163, 227 S.W.3d 450 (2006).

Evidence was sufficient to convict defendant of first degree murder and theft where, in addition to the testimony of defendant's wife, who was an accomplice, defendant's own statements to the police, his conduct before and after the crime, and statements of the victim's friends regarding her fear of defendant tended to connect him to the crimes; further, al-

though there was no evidence that defendant ever drove victim's Cadillac or had the vehicle in his possession, the jury might have determined that defendant facilitated the theft by leaving the accomplice without a vehicle at the victim's house, and there was evidence that the theft of the Cadillac was part of the plan to murder the victim. *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006).

Defendant's conviction for capital murder was supported by substantial evidence where he served as an accomplice to the murder by directing his brother to "come on down" from the attic because the victim moved, suggesting that his brother needed to finish killing the victim, which he did while defendant watched. *Wilson v. State*, 365 Ark. 664, 232 S.W.3d 455 (2006).

There was sufficient evidence to support a residential burglary conviction under § 5-39-201 based on defendant's act of helping to remove, transport, and sell stolen items, even though he did not enter a residence himself. Therefore, a motion for a directed verdict was properly denied. *Hickman v. State*, 99 Ark. App. 363, 260 S.W.3d 747 (2007), rev'd, 372 Ark. 438, 277 S.W.3d 217 (2008).

Pursuant to subsection (b) of this section, the state presented sufficient evidence of premeditation and deliberation: the evidence presented at trial showed that defendant was aware that several individuals desired that the victim be killed; that the killer who stabbed the victim approached defendant on at least three occasions about joining him in committing the killing; that despite his close relationship with the victim, defendant never warned her of any danger; that on the day of the murder, the killer announced to defendant they were going to

“make this money”; that defendant rode with the killer and two other individuals to the victim’s home; that defendant gained entry to the victim’s home; and that defendant was present in the bedroom where the victim’s body was found. In addition, defendant fled to Cleveland, Ohio after the crime. *Lawshea v. State*, 2009 Ark. 600, 357 S.W.3d 901 (2009).

Substantial evidence supported defendant’s convictions for aggravated robbery, kidnapping, aggravated assault, theft of property, unlawful discharge of a firearm from a vehicle, and fleeing because while the state did not prove that defendant actually entered a bank, it did provide substantial evidence that he was the driver of the getaway car and thus was an accomplice of the two men who committed the aggravated robbery, kidnapping, and theft of property; while defendant did not personally shoot at an officer’s vehicle, his conduct of driving the fleeing vehicle while another person in the car fired the shots sufficiently implicated him as an accomplice to unlawfully discharging a firearm from a vehicle. *Barber v. State*, 2010 Ark. App. 210, 374 S.W.3d 709 (2010).

State presented sufficient evidence to show that defendant was an accomplice to his traveling companion’s crime of robbing a bank because defendant was in proximity of the crime, he had the opportunity to help the companion get away from the bank, and he associated with the companion both immediately before and immediately after the companion robbed the bank; defendant and the companion were traveling together for at least three weeks before the bank robbery, they arrived at the bank separately, defendant left the parking lot as the companion exited the vehicle to rob the bank, and he picked the companion up off the premises. *Grissom v. State*, 2010 Ark. App. 504, — S.W.3d — (2010).

Defendant’s convictions for breaking or entering, in violation of § 5-39-202(1), and theft of property, in violation of § 5-36-103(a)(1), were supported by the evidence because defendant’s unlawful presence near a storage shed, flight from the victim, and association with persons involved in the crimes suggested that defendant jointly participated in the crimes under subdivision (b)(2) of this section.

*Goforth v. State*, 2010 Ark. App. 735, — S.W.3d — (2010).

Sufficient evidence supported defendant’s convictions as an accomplice, as defined in this section, to aggravated robbery and theft of property because defendant was present during the crime, the state established a substantial association between defendant and codefendant, and, based on those linking facts, it was reasonable for the jury to conclude that defendant assisted her codefendant by finding the victim, setting up a meeting, leading the victim to a remote location, assuring the victim would have a substantial amount of cash, moving to the backseat of the car during the robbery, and by encouraging the victim to give codefendant the cash. *Ramsey v. State*, 2010 Ark. App. 836, 378 S.W.3d 797 (2010).

Trial court did not err in denying defendant’s motion for a directed verdict during a trial for first-degree murder as an accomplice, in violation of § 5-10-102(a)(2) and subdivision (a)(1) of this section, because a codefendant testified that defendant hired the codefendant to murder his wife; the state presented the testimony of five witnesses concerning the fear of defendant’s wife that he would kill her. *Camp v. State*, 2011 Ark. 155, 381 S.W.3d 11 (2011).

Judgment finding that appellant was an accomplice to misdemeanor theft of property was affirmed because appellant and the thief stood outside the off-limits locker room together, looked down the hall, went into the locker room together, looked out of and reentered the locker room more than once, and then left the locker room together. *T.D. v. State*, 2012 Ark. App. 140, — S.W.3d — (2012).

Substantial evidence supported a juvenile’s second-degree battery disposition based on accomplice liability under subdivisions (a)(1)-(2) and (b)(1)-(2) of this section because a codefendant testified that the juvenile solicited and encouraged the plan to beat her boyfriend, who she suspected of cheating; the juvenile could be found guilty of the conduct of her accomplices who threw the punches. *L.C. v. State*, 2012 Ark. App. 666, — S.W.3d —, 2012 Ark. App. LEXIS 782 (Nov. 28, 2012).

Evidence was sufficient to support convictions of aggravated robbery, theft of property, aggravated assault, and an enhancement due to the use of a firearm



because the victim identified appellant as the principal involved in several crimes and the accomplice under subsection (a) of this section as to the theft. The jury did not have to believe testimony from the other participant about appellant's involvement, and there were other factors linking appellant to the crimes; both appellant and the other participant fled the scene, they were both found hiding in the same apartment, and they were both in proximity to a loaded gun and the victim's pants. *Bass v. State*, 2013 Ark. App. 55, — S.W.3d — (2013).

Evidence was sufficient to support convictions of aggravated robbery, theft of property, aggravated assault, and an enhancement due to the use of a firearm because the victim identified appellant as the principal involved in several crimes and the accomplice under subsection (a) of this section as to the theft. The jury did not have to believe testimony from the other participant about appellant's involvement, and there were other factors linking appellant to the crimes; both appellant and the other participant fled the scene, they were both found hiding in the same apartment, and they were both in proximity to a loaded gun and the victim's pants. *Bass v. State*, 2013 Ark. App. 55, — S.W.3d — (2013).

Evidence was sufficient to sustain convictions for capital murder and aggravated robbery because a witness's testimony corroborated that defendant was an accomplice to the aggravated robbery, defendant knew there was a large amount of marijuana at the home, a gun was used during the robbery, and the victim's death occurred during the robbery under circumstances manifesting extreme indifference to the value of human life. *Bradley v. State*, 2013 Ark. 58, — S.W.3d — (2013).

### Instructions.

Although there was sufficient evidence to support a burglary conviction, a trial court committed reversible error when it failed to give a disputed accomplice jury instruction; the evidence showed that a witness in the case did more than just acquiesce to the burglary and fail to notify police. Specifically, the witness accompanied defendant and an associate when they left the scene of the crime; the witness knew that the stolen merchandise was transported in defendant's van; the

witness accepted a stolen check from the associate; he was present when the stolen merchandise was sold; and he did not reveal the information to authorities until he was arrested for using the stolen check. *Hickman v. State*, 99 Ark. App. 363, 260 S.W.3d 747 (2007), rev'd, 372 Ark. 438, 277 S.W.3d 217 (2008).

During defendant's trial for aggravated robbery, theft, and battery, the trial court did not err in instructing the jury on accomplice liability under subsection (a) of this section; the jury could have considered defendant a principal or an accomplice to the persons involved in a "drug deal gone bad." *Taylor v. State*, 2013 Ark. App. 146, — S.W.3d — (2013).

### Liability.

When two people assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both; one cannot disclaim accomplice liability simply because he did not personally take part in every act that went to make up the crime as a whole. *Henson v. State*, 94 Ark. App. 163, 227 S.W.3d 450 (2006).

Defendant's conviction for capital murder, in violation of § 5-10-101(a)(4), was proper because there was substantial evidence that defendant was guilty as an accomplice pursuant to §§ 5-2-401, 5-2-402(2) and subdivisions (b)(1) and (2) of this section, and his argument that there was insufficient evidence of his acting as an accomplice by encouraging, aiding, or assisting the killer in stabbing the victim, was not preserved for review. *Lawshea v. State*, 2009 Ark. 600, 357 S.W.3d 901 (2009).

### Testimony.

Defendant's convictions for capital murder and kidnapping were appropriate because a witness' testimony alone was enough to corroborate an accomplice's testimony against defendant. Evidence showed that bullets found near the victims' bodies were fired from a .22 caliber rifle and a .38 caliber revolver and according to another witness, an individual wanted to buy a .38 caliber revolver from defendant; essentially, when all of the evidence was viewed in a light most favorable to the state, it tended to connect defendant to the commission of the crimes. *Gilcrease v. State*, 2009 Ark. 298, 318 S.W.3d 70 (2009).

**Cited:** Strain v. State, 2012 Ark. 42, 394 S.W.3d 294 (2012).

## 5-2-406. Multiple convictions — Different degrees.

### CASE NOTES

#### **Applicability.**

Although this section is a correct statement of the law, it is not a model jury instruction; it is unnecessary to give it to the jury when its substance is covered by other instructions. *Wilson v. State*, 364 Ark. 550, 222 S.W.3d 171 (2006).

During defendant's trial for capital murder, the trial court correctly refused to give a proffered non-model jury instruction because defendant was tried alone and the liability of her sons, who were also charged with capital murder for the murder of their landlord, had not been decided; this section is not relevant where the defendant is tried alone. *Wilson v.*

*State*, 364 Ark. 550, 222 S.W.3d 171 (2006).

Trial court did not err in refusing to give the jury instruction concerning different criminal liabilities of co-defendants because the jury found defendant guilty of capital murder, even though it had been instructed on the lesser included offenses of first and second-degree murder; thus, any error in failing to give a manslaughter or negligent homicide instruction was cured. *Vidos v. State*, 367 Ark. 296, 239 S.W.3d 467 (2006).

**Cited:** Strain v. State, 2012 Ark. 42, 394 S.W.3d 294 (2012).

## SUBCHAPTER 5 — ORGANIZATIONS AND THEIR AGENTS

### SECTION.

5-2-501. Definitions.

### 5-2-501. Definitions.

As used in this subchapter:

(1) "Agent" means any officer, director, or employee of an organization or any other person who is authorized to act in behalf of an organization;

(2) "High managerial agent" means an agent or officer of an organization who has duties of such responsibility that his or her conduct reasonably may be assumed to represent the policy of the organization; and

(3) "Organization" means a legal entity and includes:

(A) A corporation, company, association, firm, partnership, or joint-stock company;

(B) A foundation, institution, society, union, club, or church; or

(C) Any other group of persons organized for any purpose.

**History.** Acts 1975, No. 280, § 401; A.S.A. 1947, § 41-401.

**Publisher's Notes.** This section is be-

ing set out to reflect a change at the end of (2).



## SUBCHAPTER 6 — JUSTIFICATION

### SECTION.

- 5-2-605. Use of physical force generally.  
 5-2-606. Use of physical force in defense of a person.  
 5-2-607. Use of deadly physical force in defense of a person.

### 5-2-601. Definitions.

### SECTION.

- 5-2-615. Use of physical force by a pregnant woman in defense of her unborn child.  
 5-2-622. Gambling debts and losses.

## CASE NOTES

### Deadly Physical Force.

Preponderance of the evidence supported the district court's finding that defendant's use of deadly physical force under subdivisions (2) and (6)(B) of this section, which occurred when he pointed a loaded pistol at an undercover officer, was not justified or in self defense, and thus, he was guilty of the felony of aggravated assault under Arkansas law, and the four-level enhancement under U.S. Sentencing Guidelines Manual § 2K2.1(b)(5), now (b)(6), was properly imposed because (1) defendant did not act in self-defense within the meaning of § 5-13-204(c)(2) as he used deadly force against men who had obeyed his command to leave his property and who were loitering on the public sidewalk in front of his house as there was no evidence they were imminently endanger-

ing defendant's life under § 5-2-607(a); (2) under § 5-2-607(b)(1), defendant could not use deadly force after he had retreated safely to his house and returned later, unprovoked, to threaten the men; (3) defendant's conduct was not justified as permissible defense of his property within the purview of § 5-2-608 because use of deadly physical force was not authorized by § 5-2-607, and he had no reason to believe that the men who had quietly obeyed a command to leave his property would come back to commit arson or burglary; and (4) defendant's conduct was not justified to defend his home under § 5-2-620 because the men defendant assaulted were not attempting to enter his home, so the statute did not apply. *United States v. Raglin*, 500 F.3d 675 (8th Cir. 2007).

### 5-2-603. Execution of public duty.

## CASE NOTES

### Applicability.

In a case in which defendant, a former correctional officer, was convicted by a jury for possession of methamphetamine with the intent to deliver, possession of marijuana with the intent to deliver, possession of drug paraphernalia, and furnishing prohibited articles, he argued unsuccessfully that the circuit court erred in

rejecting a proffered jury instruction on justification. Defendant did not testify at trial, and there was no evidence presented below supporting appellant's claim that his possession was the result of confiscating the contraband; rather, the testimony indicated that he was attempting to evade detection. *Waller v. State*, 2010 Ark. App. 56, — S.W.3d — (2010).

### 5-2-604. Choice of evils.

## CASE NOTES

### Actor's Conduct.

In a case where defendant was found guilty of being a felon in possession of a firearm, the trial court properly denied his

request for a jury instruction on the "choice of evils" defense under this section because (1) although he needed money, the situation did not rise to the level of the

extraordinary attendant circumstances that was required to invoke the “choice of evils” defense; and (2) there were reasonable, legal alternatives to his conduct such as having his father or another non-felon pawn the firearm. *Prodell v. State*, 102 Ark. App. 360, 285 S.W.3d 673 (2008).

Defendant’s act of going outside with

the gun and continuing interaction with the victim was sufficient evidence to reject the choice of evils defense under subdivision (a)(1) of this section and sustain his conviction for being a felon in possession of a firearm. *Green v. State*, 2011 Ark. App. 700, — S.W.3d — (2011).

### **5-2-605. Use of physical force generally.**

The use upon another person of physical force that would otherwise constitute an offense is justifiable under any of the following circumstances:

(1) A parent, teacher, guardian, or other person entrusted with care and supervision of a minor or an incompetent person may use reasonable and appropriate physical force upon the minor or incompetent person when and to the extent reasonably necessary to maintain discipline or to promote the welfare of the minor or incompetent person;

(2) A warden or other authorized official of a correctional facility may use nondeadly physical force to the extent reasonably necessary to maintain order and discipline;

(3) A person responsible for the maintenance of order in a common carrier or a person acting under the responsible person’s direction may use nondeadly physical force to the extent reasonably necessary to maintain order;

(4) A person who reasonably believes that another person is about to commit suicide or to inflict serious physical injury upon himself or herself may use nondeadly physical force upon the other person to the extent reasonably necessary to thwart the suicide or infliction of serious physical injury;

(5) A duly licensed physician or a person assisting a duly licensed physician at the duly licensed physician’s direction may use physical force for the purpose of administering a recognized form of treatment reasonably adapted to promoting the physical or mental health of a patient if the treatment is administered:

(A) With the consent of the patient or, if the patient is a minor who is unable to appreciate or understand the nature or possible consequences of the proposed medical treatment or is an incompetent person, with the consent of a parent, guardian, or other person entrusted with the patient’s care and supervision; or

(B) In an emergency when the duly licensed physician reasonably believes that no person competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

**History.** Acts 1975, No. 280, § 505; A.S.A. 1947, § 41-505; Acts 2007, No. 827, § 12.



### 5-2-606. Use of physical force in defense of a person.

(a)(1) A person is justified in using physical force upon another person to defend himself or herself or a third person from what the person reasonably believes to be the use or imminent use of unlawful physical force by that other person, and the person may use a degree of force that he or she reasonably believes to be necessary.

(2) However, the person may not use deadly physical force except as provided in § 5-2-607.

(b) A person is not justified in using physical force upon another person if:

(1) With purpose to cause physical injury or death to the other person, the person provokes the use of unlawful physical force by the other person;

(2)(A) The person is the initial aggressor.

(B) However, the initial aggressor's use of physical force upon another person is justifiable if:

(i) The initial aggressor in good faith withdraws from the encounter and effectively communicates to the other person his or her purpose to withdraw from the encounter; and

(ii) The other person continues or threatens to continue the use of unlawful physical force; or

(3) The physical force involved is the product of a combat by agreement not authorized by law.

**History.** Acts 1975, No. 280, § 506; A.S.A. 1947, § 41-506; Acts 2007, No. 827, § 13.

### CASE NOTES

#### ANALYSIS

**Evidence.**

**Justification.**

#### **Evidence.**

In a case involving terroristic acts under § 5-13-310(a)(1), the exclusion of a computer-generated threat to bolster a self-defense claim was error since the evidence was relevant under Ark. R. Evid. 401; however, the error was harmless since evidence of other threats could have been elicited. *McKeever v. State*, 367 Ark. 374, 240 S.W.2d 583 (2006).

#### **Justification.**

Because a juvenile's father had not resorted to use of a deadly weapon during an

argument, because there had been an interlude of approximately five minutes since their last confrontation, because the father, at the time he was struck, had turned away from the juvenile, and because the juvenile did not testify as to whether the juvenile's beliefs were reasonable, the juvenile lacked justification under subdivision (a)(1) of this section and §§ 5-1-102(18), 5-2-607(a)(1), (2), and was properly adjudicated as a delinquent for second-degree domestic battering. *D.W. v. State*, 2011 Ark. App. 187, — S.W.3d — (2011).

## 5-2-607. Use of deadly physical force in defense of a person.

(a) A person is justified in using deadly physical force upon another person if the person reasonably believes that the other person is:

(1) Committing or about to commit a felony involving force or violence;

(2) Using or about to use unlawful deadly physical force; or

(3) Imminently endangering the person's life or imminently about to victimize the person as described in § 9-15-103 from the continuation of a pattern of domestic abuse.

(b) A person may not use deadly physical force in self-defense if the person knows that he or she can avoid the necessity of using deadly physical force with complete safety:

(1)(A) By retreating.

(B) However, a person is not required to retreat if the person is:

(i) In the person's dwelling or on the curtilage surrounding the person's dwelling and was not the original aggressor; or

(ii) A law enforcement officer or a person assisting at the direction of a law enforcement officer; or

(2) By surrendering possession of property to a person claiming a lawful right to possession of the property.

(c) As used in this section:

(1) "Curtilage" means the land adjoining a dwelling that is convenient for residential purposes and habitually used for residential purposes, but not necessarily enclosed, and includes an outbuilding that is directly and intimately connected with the dwelling and in close proximity to the dwelling; and

(2) "Domestic abuse" means:

(A) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members; or

(B) Any sexual conduct between family or household members, whether minors or adults, that constitutes a crime under the laws of this state.

**History.** Acts 1975, No. 280, § 507; A.S.A. 1947, § 41-507; Acts 1997, No. 1257, § 1; 2007, No. 111, § 1; 2009, No. 748, § 2.

**Amendments.** The 2009 amendment, in (a)(3), deleted (a)(3)(B) and redesignated the remaining subdivision accord-

ingly; made a stylistic change in the introductory language of (b); inserted (c)(2), redesignated the remainder of (c) accordingly, substituted "residential" for "family" twice in (c)(1), and made related changes.

## CASE NOTES

### ANALYSIS

Avoidance of Danger.

Evidence.

Instructions.

Reasonable Belief or State of Mind.

### Self-Defense.

#### Avoidance of Danger.

Preponderance of the evidence supported the district court's finding that defendant's use of deadly physical force



under § 5-2-601(2) and (6)(B), which occurred when he pointed a loaded pistol at an undercover officer, was not justified or in self defense, and thus, he was guilty of the felony of aggravated assault under Arkansas law, and the four-level enhancement under U.S. Sentencing Guidelines Manual § 2K2.1(b)(5), now (b)(6), was properly imposed because (1) defendant did not act in self-defense within the meaning of § 5-13-204(c)(2) as he used deadly force against men who had obeyed his command to leave his property and who were loitering on the public sidewalk in front of his house as there was no evidence they were imminently endangering defendant's life under subsection (a) of this section; (2) under subdivision (b)(1) of this section, defendant could not use deadly force after he had retreated safely to his house and returned later, unprovoked, to threaten the men; (3) defendant's conduct was not justified as permissible defense of his property within the purview of § 5-2-608 because use of deadly physical force was not authorized by this section, and he had no reason to believe that the men who had quietly obeyed a command to leave his property would come back to commit arson or burglary; and (4) defendant's conduct was not justified to defend his home under § 5-2-620 because the men defendant assaulted were not attempting to enter his home, so the statute did not apply. *United States v. Raglin*, 500 F.3d 675 (8th Cir. 2007).

### **Evidence.**

Evidence was sufficient to rebut a claim of justification under this section and to convict defendant of attempted-capital murder and first-degree battery as defendant shot at the victim while he was running away, and defendant then drove around the neighborhood, found the victim, and fired more shots that struck the victim. *Green v. State*, 2011 Ark. App. 700, — S.W.3d — (2011).

### **Instructions.**

Because second-degree battery has as one of its elements the infliction of serious physical injury, it is a "felony involving force or violence"; thus, in a second-degree murder case, the trial court erred by failing to give a jury instruction for justification that had both second-degree battery and unlawful deadly physical force alter-

natives since both were warranted by evidence that defendant was confronted by three men in an attack before he stabbed one of them in the heart with a pocket knife. *Hamilton v. State*, 97 Ark. App. 172, 245 S.W.3d 710 (2006).

Defendant's challenge to the jury instruction used by the trial court for justification and use of physical force in defense of a person was more lenient than the instruction that defendant requested, which was based upon the use of deadly physical force, pursuant to this section, and defendant did not have a cognizable habeas corpus claim based upon the use of the instruction. *Cagle v. Norris*, 474 F.3d 1090 (8th Cir. 2007).

In a case in which the jury was instructed on justification and the use of deadly force in defense of a person under Ark. Model Jury Instruction Crim. § 705 (2d ed.) that reflected the language of this section and defendant was convicted by a jury of second-degree murder and was sentenced to prison under the enhancement provision for a total of 540 months, defendant argued unsuccessfully that the circuit court erred by refusing the jury instruction he proffered on self-defense, a non-model jury instruction reflecting the language of § 5-2-620. There was no merit to his argument that mere technical changes to § 5-2-620 and the legislature's reaffirmation of the statute's public policy somehow translated into legislative intent that juries in criminal cases be instructed as to an individual's right to defend himself or herself against a person intruding into his or her home. *Hutchinson v. State*, 2010 Ark. App. 235, — S.W.3d — (2010).

### **Reasonable Belief or State of Mind.**

Because a juvenile's father had not resorted to use of a deadly weapon during an argument, because there had been an interlude of approximately five minutes since their last confrontation, because the father, at the time he was struck, had turned away from the juvenile, and because the juvenile did not testify as to whether the juvenile's beliefs were reasonable, the juvenile lacked justification under §§ 5-1-102(18), 5-2-606(a)(1), and subdivisions (a)(1) and (2) of this section, and was properly adjudicated as a delinquent for second-degree domestic battering. *D.W. v. State*, 2011 Ark. App. 187, — S.W.3d — (2011).

**Self-Defense.**

When defendant shot and killed the victim outside his aunt's home, she testified that the victim took a few steps backward, and defendant raised his shirt, brandished a weapon, and fired upon the victim; she did not see a gun in the victim's hand, and her son also testified that defendant was the first to draw a weapon. In defendant's criminal prosecution for murder, the trial court made a credibility determination, found that defendant was the initial aggressor in the deadly altercation, and rejected his self-defense claim under subdivision (a)(2) of this section; the Court of Appeals of Arkansas found substantial evidence to support the trial court's decision. *Dishman v. State*, 2009 Ark. App. 715, — S.W.3d — (2009).

Substantial evidence negated defendant's claim of self-defense under subdivi-

sion (a)(2) of this section in his trial for first degree battery, under § 5-13-201, because there was no evidence that the victim was armed when defendant shot him and, although defendant testified that the victim attacked him earlier in the day, there was no evidence of an injury to defendant and defendant testified that he was not afraid of the victim; although defendant testified at trial that he was afraid that the victim was going to attack him at the time that he shot him, defendant never made a similar claim in his statement to the police after the incident. *Metcalf v. State*, 2011 Ark. App. 55, — S.W.3d — (2011), rehearing denied, — Ark. App. —, — S.W.3d —, 2011 Ark. App. LEXIS 147 (Feb. 23, 2011).

**Cited:** *Stocker v. State*, 2012 Ark. App. 624, — S.W.3d —, 2012 Ark. App. LEXIS 753 (Nov. 7, 2012).

**5-2-608. Use of physical force in defense of premises.****CASE NOTES****Evidence.**

Preponderance of the evidence supported the district court's finding that defendant's use of deadly physical force under § 5-2-601(2) and (6)(B), which occurred when he pointed a loaded pistol at an undercover officer, was not justified or in self defense, and thus, he was guilty of the felony of aggravated assault under Arkansas law, and the four-level enhancement under U.S. Sentencing Guidelines Manual § 2K2.1(b)(5), now (b)(6), was properly imposed because (1) defendant did not act in self-defense within the meaning of § 5-13-204(c)(2) as he used deadly force against men who had obeyed his command to leave his property and who were loitering on the public sidewalk in front of his house as there was no evidence they were imminently endangering defendant's life under § 5-2-607(a); (2) under § 5-2-607(b)(1), defendant could not use deadly force after he had retreated safely to his house and returned later, unprovoked, to threaten the men; (3) defendant's conduct was not justified as permissible defense of his property within the purview of this section because use of

deadly physical force was not authorized by § 5-2-607, and he had no reason to believe that the men who had quietly obeyed a command to leave his property would come back to commit arson or burglary; and (4) defendant's conduct was not justified to defend his home under § 5-2-620 because the men defendant assaulted were not attempting to enter his home, so the statute did not apply. *United States v. Raglin*, 500 F.3d 675 (8th Cir. 2007).

Defendant's conviction for battery in the second degree was proper because he did not have a justification defense under subsection (a) of this section since his version of the events was unbelievable; any reasonable person would have realized that the victim was acting on behalf of a repossession agency and therefore, defendant could not have been acting on a reasonable belief that he was preventing a criminal trespass. There was also no evidence to indicate that the victim used force against defendant or threatened him with force. *Washington v. State*, 2010 Ark. App. 339, 374 S.W.3d 822 (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 379 (June 24, 2010).



**5-2-614. Use of reckless or negligent force.****CASE NOTES****Instructions.**

There was no abuse of discretion in a trial court's refusal of defendant's proffered imperfect self-defense jury instruction because there was no rational basis for the instruction where the only basis for

the instruction was defendant's self-serving statements or testimony, contradicted by other witnesses. *Norris v. State*, 2010 Ark. 174, 368 S.W.3d 52 (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 292 (May 20, 2010).

**5-2-615. Use of physical force by a pregnant woman in defense of her unborn child.**

(a) As used in this section:

(1) "Pregnant" means the female reproductive condition of having an unborn child in the female's body; and

(2) "Unborn child" means the offspring of human beings from conception until birth.

(b) A pregnant woman is justified in using physical force or deadly physical force against another person to protect her unborn child if, under the circumstances as the pregnant woman reasonably believes them to be, she would be justified under § 5-2-606 or § 5-2-607 in using physical force or deadly physical force to protect herself against the unlawful physical force or unlawful deadly physical force she reasonably believes to be threatening her unborn child.

(c) The justification for using physical force or deadly physical force against another person to protect a pregnant woman's unborn child is not available if:

(1) The use of the physical force or deadly physical force for protection was used by a person other than the pregnant woman; or

(2)(A) The use of the deadly physical force for protection would not be allowed under § 5-2-607(b).

(B) However, the pregnant woman is not obligated to retreat or surrender possession of property as described in § 5-2-607(b) unless the pregnant woman knows she can avoid the necessity of using deadly physical force and simultaneously ensure the complete safety of her unborn child.

**History.** Acts 2013, No. 156, § 3.

**A.C.R.C. Notes.** Acts 2013, No. 156, § 1, provided: Findings.

"The General Assembly finds that:

"(1) Violence and abuse are often higher during pregnancy than during any other period in a woman's lifetime;

"(2) Women are more likely to suffer increased abuse as a result of unintended pregnancies;

"(3) Younger women are at a higher risk for pregnancy-associated homicide;

"(4) A pregnant woman is more likely to be a victim of homicide than to die of any other cause;

"(5) Homicide and other violent crimes are the leading causes of death for women of reproductive age;

"(6) Husbands, ex-husbands, or boyfriends are often the perpetrators of pregnancy-associated homicide or violence;

"(7) Moreover, when husbands, ex-husbands, or boyfriends are involved, the violence is often directed at the unborn child

or intended to end or jeopardize the pregnancy;

“(8) Violence against a pregnant woman puts the life and bodily integrity of both the pregnant woman and the unborn child at risk;

“(9) According to the Centers for Disease Control and Prevention, every year in the United States more than three hundred thousand (300,000) pregnant women experience some kind of violence involving an intimate partner;

“(10) The Centers for Disease Control and Prevention define domestic violence during pregnancy as ‘physical, sexual, or psychological/emotional violence or threats of physical or sexual violence that are inflicted on a pregnant woman’; and

“(11) In a household survey cited in ‘Battering and Pregnancy’ (Midwifery To-

day 19:1998), it was found that pregnant women are sixty and six tenths percent (60.6%) more likely to be beaten than women who are not pregnant.”

Acts 2013, No. 156, § 2, provided: Legislative intent.

“By passing this act, the General Assembly intends to:

“(1) Ensure that the affirmative right of a pregnant woman to carry her child to term is protected;

“(2) Ensure that defenses to criminal liability provide for a pregnant woman’s right to use physical force including deadly force to protect her unborn child; and

“(3) Supplement, but not supersede, the applicability of any other defenses to criminal liability currently provided in the Arkansas Code.”

## 5-2-620. Use of force to defend persons and property within home.

### CASE NOTES

#### ANALYSIS

**Burden of Proof.**

**Instructions.**

**Unprovoked Attack.**

#### **Burden of Proof.**

State’s obligation to prove the elements of aggravated assault beyond a reasonable doubt subsumed the lesser burden of proof to overcome the presumption of legality in the defense of one’s home. *Montalvo v. State*, 2012 Ark. App. 119, — S.W.3d — (2012).

#### **Instructions.**

In a case in which the jury was instructed on justification and the use of deadly force in defense of a person under Ark. Model Jury Instruction Crim. § 705 (2d ed.) that reflected the language of § 5-2-607 and defendant was convicted by a jury of second-degree murder and was sentenced to prison under the enhancement provision for a total of 540 months, defendant argued unsuccessfully that the circuit court erred by refusing the jury instruction he proffered on self-defense, a non-model jury instruction reflecting the language of this section. There was no merit to his argument that mere technical changes to this section and the legisla-

ture’s reaffirmation of the statute’s public policy somehow translated into legislative intent that juries in criminal cases be instructed as to an individual’s right to defend himself or herself against a person intruding into his or her home. *Hutchinson v. State*, 2010 Ark. App. 235, — S.W.3d — (2010).

#### **Unprovoked Attack.**

Preponderance of the evidence supported the district court’s finding that defendant’s use of deadly physical force under § 5-2-601(2) and (6)(B), which occurred when he pointed a loaded pistol at an undercover officer, was not justified or in self defense, and thus, he was guilty of the felony of aggravated assault under Arkansas law, and the four-level enhancement under U.S. Sentencing Guidelines Manual § 2K2.1(b)(5), now (b)(6), was properly imposed because (1) defendant did not act in self-defense within the meaning of § 5-13-204(c)(2) as he used deadly force against men who had obeyed his command to leave his property and who were loitering on the public sidewalk in front of his house as there was no evidence they were imminently endangering defendant’s life under § 5-2-607(a); (2) under § 5-2-607(b)(1), defendant could



not use deadly force after he had retreated safely to his house and returned later, unprovoked, to threaten the men; (3) defendant's conduct was not justified as permissible defense of his property within the purview of § 5-2-608 because use of deadly physical force was not authorized by § 5-2-607, and he had no reason to believe that the men who had quietly

obeyed a command to leave his property would come back to commit arson or burglary; and (4) defendant's conduct was not justified to defend his home under this section because the men defendant assaulted were not attempting to enter his home, so the statute did not apply. *United States v. Raglin*, 500 F.3d 675 (8th Cir. 2007).

**5-2-622. Gambling debts and losses.**

It is no defense to a prosecution for a crime of violence that a person was seeking recovery or replevin of a gambling debt or loss in circumstances in which civil recovery is permitted by § 16-118-103.

**History.** Acts 2009, No. 460, § 1.  
**A.C.R.C. Notes.** Acts 2009, No. 460, § 3, provided: "It is the intent of this Act to overrule *Daniels v. State*, 373 Ark. 536, \_\_\_ S.W.3d \_\_\_ (2008), and its interpreta-

tion of §16-118-103(a)(1). That case and its interpretation of replevin and the holding in *Davidson v. State*, 200 Ark. 495, 139 S.W.2d 409 (1940), are contrary to the public policy of this State."

**CHAPTER 3**  
**INCHOATE OFFENSES**

**SUBCHAPTER 2 — CRIMINAL ATTEMPT**

**5-3-201. Conduct constituting attempt.**

**CASE NOTES**

**ANALYSIS**

Attempted Aggravated Robbery.  
 Attempted Capital Murder.  
 Attempted Criminal Mischief.  
 Attempted Murder.  
 Attempted Rape.  
 Evidence.  
 Lesser Included Offenses.

**Attempted Aggravated Robbery.**

Jury instruction on the lesser-included offense of attempted aggravated robbery was not warranted because there was no evidence of the offense of attempt under subdivision (a)(2) of this section; when appellant stormed out of a retail store's stockroom brandishing a gun and pointing it employees, he actually completed the offense of aggravated robbery. *Thomas v. State*, 2012 Ark. App. 466, — S.W.3d — (2012).

**Attempted Capital Murder.**

Aggravated robbery is not a lesser included offense of attempted capital murder because, while an aggravated-robbery charge shares the intent to rob with attempted capital murder, aggravated robbery also requires one of three other elements. Two of those elements, being armed with a deadly weapon, or representing as such, are unique to aggravated robbery, and the third possible element of aggravated robbery is having inflicted or attempted to inflict death or serious physical injury upon another, which is not equivalent to the element in attempted capital murder that a defendant, in the course of or in flight from such robbery, caused the death of a person under circumstances manifesting extreme indifference to the value of human life. *Clark v. State*, 373 Ark. 161, 282 S.W.3d 801 (2008).

Prohibition against double jeopardy was not violated when defendant was convicted of aggravated robbery and attempted capital murder because the robbery was the underlying felony, and aggravated robbery was not the lesser-included offense of attempted capital murder. *Clark v. State*, 373 Ark. 161, 282 S.W.3d 801 (2008).

Defendant's conviction for attempted capital murder, in violation of § 5-10-101(a)(4) and subdivision (a)(2) of this section, was supported by the evidence because the victim, defendant's wife, testified that he came into the garage demanding to talk to her, shot her, and commented that she should die; defendant's coworker testified that defendant stated that he was going to shoot his wife if she had any divorce papers. *Johnson v. State*, 375 Ark. 462, 291 S.W.3d 581 (2009), cert. denied, *Johnson v. Arkansas*, 558 U.S. 847, 130 S. Ct. 118, 175 L. Ed. 2d 77, 2009 U.S. LEXIS 5218 (2009).

Where defendant picked his ex-wife up from work, drove her to a bridge, stabbed her, threw her to the ground, and pushed her into the water, the evidence was sufficient to support his conviction for attempted first-degree murder in violation of § 5-10-102(a)(2) and subdivision (a)(2) of this section. When defendant learned the police had been called, he threw the victim a rope and told her to get herself out the water. *Jones v. State*, 2009 Ark. App. 135, — S.W.3d — (2009).

In a case in which defendant was found guilty on three counts of attempted first-degree murder, of being a felon in possession of a firearm, and three counts of committing a terroristic act, he unsuccessfully argued that substantial evidence did not support his convictions; while the evidence was circumstantial, substantial evidence supported the conclusion that defendant committed the crimes in question. Moments after the shooting, a dark-colored car was observed speeding away from the area without its lights on even though it was dark outside, that car crashed into another vehicle five blocks from the shooting, a witness positively identified defendant as the person who emerged from the driver's side of the car carrying a long rifle, shell casings from a rifle were recovered from the scene of the shooting, defendant's DNA was found on the driver's side airbag of the car, and the car contained a

letter addressed to defendant. *Smith v. State*, 2010 Ark. App. 216, — S.W.3d — (2010).

### **Attempted Criminal Mischief.**

Judgment notwithstanding the verdict was properly granted in a malicious prosecution case where the passenger of a truck was arrested when the vehicle bumped a key-card entry gate; even if there was no damage to the gate or a mistake about such, there was still probable cause for an arrest for criminal mischief or attempt under Ark. R. Crim. P. 4.1(c). *Coombs v. Hot Springs Village Prop. Owners Ass'n*, 98 Ark. App. 226, 254 S.W.3d 5 (2007), rehearing denied, *Coombs v. Hot Springs Vill. Prop. Owners Ass'n*, — Ark. App. —, — S.W.3d —, 2007 Ark. App. LEXIS 543 (May 2, 2007).

### **Attempted Murder.**

Evidence was sufficient to sustain defendant's conviction for attempted first-degree murder under subdivision (a)(2) of this section and § 5-10-102(a)(1) as the evidence demonstrated that defendant, in the process of fleeing a store that he had just robbed at gunpoint, shot at a police officer two times. A jury could reasonably conclude that the act of shooting at someone was a substantial step toward causing that person's death. *Lambert v. State*, 2011 Ark. App. 258, — S.W.3d — (2011).

Defendant's convictions for first-degree murder and aggravated robbery, in violation of this § 5-10-102(a), this section, and § 5-12-103(a), were supported by sufficient evidence, as the evidence showed that defendant was armed with a deadly weapon for the purpose of committing the theft of a cab driver, that defendant threatened the driver, and that the driver was shot in the struggle over the gun. *Garr v. State*, 2011 Ark. App. 509, — S.W.3d — (2011).

Evidence was sufficient to sustain defendant's attempted first-degree murder conviction because defendant knocked on a door and fired a gun at the victim when he opened the door. The jury could reasonably have inferred that defendant purposely engaged in conduct that constituted a substantial step in a course of conduct known to cause death to another person, regardless of that person's identity. *Wells v. State*, 2012 Ark. App. 596, — S.W.3d —, 2012 Ark. App. LEXIS 718 (Oct. 24, 2012).



### Attempted Rape.

Evidence was sufficient to sustain an attempted rape conviction where defendant initiated a call to the 13 year old victim, picked her up under false pretenses, isolated her in a motel room, told her that he and his girlfriend intended to engage in sexual intercourse with her, and he returned to the motel room with his girlfriend; those steps went beyond mere planning and preparation. *Mitchem v. State*, 96 Ark. App. 78, 238 S.W.3d 623 (2006).

Defendant's conviction for attempted rape of his 13-year-old stepdaughter, in violation of § 5-14-103(a)(3)(A) and subsection (b) of this section, was supported by the evidence because the victim testified that defendant, who wanted oral sex from her, thrust himself upon her while she was in the shower until her grandmother, who lived next door, appeared at the front door. *Forrest v. State*, 2010 Ark. App. 686, — S.W.3d — (2010).

### Evidence.

Sufficient evidence supported the conclusion that a defendant intended to kill a victim: a witness testified that the witness gave defendant a gun, other witnesses testified that defendant shot the victim with that gun, defendant's girlfriend testified that while waiting for defendant in a car, the girlfriend heard two or three shots, and then defendant ran to the car, and inconsistent witness statements regarding whether the shooting occurred inside or outside the victim's apartment

were not relevant to the conviction; therefore, defendant's motion for a directed verdict was properly denied. *Hawkins v. State*, 2009 Ark. App. 675, — S.W.3d — (2009).

Denial of appellant's, an inmate's, petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1 was appropriate because the evidence demonstrated that he was not prejudiced by his trial counsel's failure to properly renew his motion for directed verdict at the close of all the evidence. While the inmate was unable to challenge the sufficiency of the evidence in his direct appeal, there was substantial evidence to support the verdicts, including the inmate himself admitting to hitting his wife's car from behind and then getting out of his truck and shooting her; the surviving victim testified that after falling in an attempt to run away from the scene, she looked up and saw the inmate over her smiling and holding a shotgun. *Davis v. State*, 2011 Ark. 493, — S.W.3d — (2011).

### Lesser Included Offenses.

During defendant's trial for attempted murder, the court did not err in refusing to instruct the jury on the lesser-included offense of attempted extreme-emotional-disturbance manslaughter, in violation of § 5-10-104(a)(1)(A) and subsection (b) of this section, because defendant's self-serving testimony was the only evidence of provocation presented; the evidence corroborated the victim's testimony that defendant stabbed the victim with a knife. *Townsell v. State*, 2010 Ark. App. 754, — S.W.3d — (2010).

## 5-3-203. Classification.

### CASE NOTES

#### Reasonable Cause to Arrest.

Denial of motion to suppress was not clearly against the preponderance of the evidence, because the inventory search of defendant's vehicle was proper upon defendant's lawful arrest, and it was standard police policy to inventory the contents of any vehicle before having it towed; at the time of defendant's arrest

theft of property was a Class C felony if the value of the property was less than \$2,500 but more than \$500, and criminal attempt was a Class D felony if the offense attempted was a Class C felony. *Boykin v. State*, 2012 Ark. App. 274, — S.W.3d — (2012).

**Cited:** *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007).

5-3-204. Renunciation.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

SUBCHAPTER 3 — CRIMINAL SOLICITATION

5-3-302. Renunciation.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

SUBCHAPTER 4 — CRIMINAL CONSPIRACY

5-3-401. Conduct constituting conspiracy.

CASE NOTES

ANALYSIS

Evidence.  
Sentence.

Evidence.

Defendant committed an overt act in furtherance of a conspiracy to commit kidnapping, aggravated robbery, theft of property, and aggravated residential burglary because he took another person to his residence and showed the person the inside of the premises, discussed how to break in the residence and how to subdue

his wife, and identified the property to be taken from the residence. Winkler v. State, 2012 Ark. App. 704, — S.W.3d —, 2012 Ark. App. LEXIS 825 (Dec. 12, 2012).

Sentence.

There was no error in the trial court's sentencing of defendant because the court complied with the conspiracy statute and had the authority to impose a sentence of nine years' imprisonment with respect to the conspiracy conviction. Winkler v. State, 2012 Ark. App. 704, — S.W.3d —, 2012 Ark. App. LEXIS 825 (Dec. 12, 2012).

5-3-403. Multiple criminal objectives.

CASE NOTES

Multiple Substantive Offenses.

Trial court did not err because judicial precedent allowed the prosecution of one count of conspiracy to commit multiple object offenses; moreover, defendant was not prejudiced by the inclusion of multiple

object offenses in the single charge because he faced thirty years in prison but the jury sentenced him to nine years' imprisonment. Winkler v. State, 2012 Ark. App. 704, — S.W.3d —, 2012 Ark. App. LEXIS 825 (Dec. 12, 2012).



5-3-405. Renunciation of criminal purpose.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CHAPTER 4  
DISPOSITION OF OFFENDERS

SUBCHAPTER.

- 1. GENERAL PROVISIONS.
- 2. FINES, COSTS, AND RESTITUTION.
- 3. SUSPENSION OR PROBATION.
- 4. IMPRISONMENT.
- 5. EXTENDED TERM OF IMPRISONMENT.
- 6. TRIAL AND SENTENCE — CAPITAL MURDER.
- 7. ENHANCED PENALTIES FOR CERTAIN OFFENSES.
- 8. SENTENCING ALTERNATIVE — COMMUNITY SERVICE WORK.
- 9. SENTENCING ALTERNATIVE — PRE-ADJUDICATION PROBATION.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 5-4-101. Definitions.
- 5-4-104. Authorized sentences generally.
- 5-4-105. [Repealed.]

SECTION.

- 5-4-106. Extended post-conviction no contact order.

**Effective Dates.** Acts 2013, No. 39, § 2: Feb. 6, 2013. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that high-level sex offenders often target young children as victims; that during the summer months, state parks are popular destinations for families with young children, especially those with a swimming area or a playground; and that this act is immediately necessary in order for it to be effective before the late spring and summer of this year when children

will begin to go to state parks. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

5-4-101. Definitions.

As used in this chapter:

(1)(A) “Imprisonment” means:

(i) Incarceration in a detention facility operated by the state or any of its political subdivisions; or

(ii) Home detention as described in § 16-93-708.

(B) “Imprisonment” may mean incarceration in a privately operated detention facility under contract to the state or any of its political subdivisions;

(2) “Probation” or “place on probation” means a procedure in which a defendant who pleads or is found guilty of an offense is released by the court without pronouncement of sentence but subject to the supervision of a probation officer;

(3) “Probation officer” means a salaried officer attached to the court pursuant to § 16-93-402 [repealed] or a reputable person designated by the court to supervise a defendant who is placed on probation;

(4) “Recidivism” means a criminal act that results in the rearrest, reconviction, or return to incarceration of a person with or without a new sentence during a three-year period following the person’s release from custody;

(5)(A). “Restitution” means the act of making good or giving equivalent value for any loss, damage, or injury.

(B) “Restitution” may also include in the event of an injury or loss that the offender has special capacity to restore or repair a sentence to perform that reparation; and

(6) “Suspension” or “suspend imposition of sentence” means a procedure in which a defendant who pleads or is found guilty of an offense is released by the court without pronouncement of sentence and without supervision.

**History.** Acts 1975, No. 280, § 801; 1981, No. 620, § 6; A.S.A. 1947, § 41-801; Acts 1993, No. 533, § 1; 1993, No. 553, § 1; 1999, No. 216, § 1; 2005, No. 680, § 1; 2013, No. 1030, § 1.

**Amendments.** The 2013 amendment added the definition for “Recidivism.”

**A.C.R.C. Notes.** Acts 2011, No. 570, § 91, repealed § 16-93-402 referenced in subdivision (3) of this section. For current law, see generally 16-93-301 et seq.

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2005 Arkansas General As-

sembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

## CASE NOTES

### ANALYSIS

Restitution.

Suspension or Probation.

### Restitution.

Trial court had no jurisdiction to revoke defendant’s suspended sentence because defendant owed no restitution at the end of his suspended sentence, and the trial court could not retain jurisdiction over him; defendant’s child support was not to

make good an actual economic loss of a victim of his failure to comply with the reporting requirements of the Sex and Child Offender Registration Act. *Owens v. State*, 2009 Ark. App. 532, 337 S.W.3d 527 (2009).

Court retained jurisdiction to revoke the suspended sentence for failure to pay restitution, because the petitioner was charged with fleeing to avoid arrest for possession of marijuana and causing property damage while fleeing, and was or-



dered to pay restitution for the damage he caused during the course of the criminal episode. *Arter v. State*, 2012 Ark. App. 327, — S.W.3d — (2012).

**Suspension or Probation.**

Based on the clear, unambiguous language of § 12-12-1109(a)(2)(A) and § 12-12-1103(1), it was clear that the trial court did not illegally sentence defendant by requiring him to submit to a DNA sample after he received a suspended sentence because whatever conflict subsection (a) of this section might have provided, if any, was resolved by the fact that its defini-

tions were used only for Title 5, Chapter 4. *Davis v. State*, 94 Ark. App. 240, 228 S.W.3d 529 (2006).

Trial court did not err in sentencing defendant after revoking his probation because defendant pleaded guilty to second-degree domestic battery, § 5-26-304, and third-degree domestic battery, § 5-26-305, and his sentences of ten and six years, respectively, were sentences that could have been originally imposed for the offenses of which he was found guilty. *Jones v. State*, 2012 Ark. App. 69, 388 S.W.3d 503 (2012).

**5-4-102. Presentence investigation.**

**CASE NOTES**

**Presentence Report.**

Court did not abuse its discretion by admitting the presentence report into evidence, because the probation officer's report was not admitted as expert testimony and the court assured defendant it would

give the report the proper weight, and defendant was aware of the contents of the report and elicited contradictory testimony from the therapist. *Howerton v. State*, 2012 Ark. App. 331, — S.W.3d — (2012).

**5-4-103. Sentencing — Role of jury and court.**

**CASE NOTES**

**ANALYSIS**

Sentence Fixed by Jury.

Sentencing by Court.

**Sentence Fixed by Jury.**

Trial court imposed an illegal sentence when it rejected a jury's verdict and took it upon itself to sentence defendant where the jury's sentencing verdict of zero years in prison and a fine of zero dollars was a proper and valid sentence for second-degree battery. *Donaldson v. State*, 370 Ark. 3, 257 S.W.3d 74 (2007).

Petitioner's death sentence could not stand because the manner in which the jury completed its form allowed only the conclusion that it eliminated from its consideration all evidence presented of mitigating circumstances and sentenced petitioner to death solely based on an aggravating circumstance, which was reversible error. *Williams v. State*, 2011 Ark. 534, — S.W.3d — (2011).

**Sentencing by Court.**

Sentence imposed on the enhancement offense of commission of a felony with a firearm was not void or illegal as it was specifically allowed by statute. By failing to object when given the opportunity, defendants indicated their agreement with the trial court's fixing the punishment. *Watkins v. State*, 2009 Ark. App. 124, 302 S.W.3d 635 (2009).

Under subdivision (b)(4) of this section, the judge rather than the jury may impose a sentence where the prosecution and the defense agree that the court may fix punishment. Nevertheless, it is generally improper for the trial court to sentence on the enhancement provision in place of the jury. *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (2010).

**Cited:** *Sullivan v. State*, 366 Ark. 183, 234 S.W.3d 285 (2006); *Loar v. State*, 368 Ark. 171, 243 S.W.3d 923 (2006); *Henry v. State*, 2011 Ark. App. 169, 378 S.W.3d 832 (2011).

**5-4-104. Authorized sentences generally.**

(a) No defendant convicted of an offense shall be sentenced otherwise than in accordance with this chapter.

(b) A defendant convicted of capital murder, § 5-10-101, or treason, § 5-51-201, shall be sentenced to death or life imprisonment without parole in accordance with §§ 5-4-601 — 5-4-605, 5-4-607, and 5-4-608, except if the defendant was younger than eighteen (18) years of age at the time he or she committed the capital murder he or she shall be sentenced to:

(1) Life imprisonment without parole under § 5-4-606; or

(2) Life imprisonment with the possibility of parole after serving a minimum of twenty-eight (28) years' imprisonment.

(c)(1) A defendant convicted of a Class Y felony or murder in the second degree, § 5-10-103, shall be sentenced to a term of imprisonment in accordance with §§ 5-4-401 — 5-4-404.

(2) In addition to imposing a term of imprisonment, the trial court may sentence a defendant convicted of a Class Y felony or murder in the second degree, § 5-10-103, to any one (1) or more of the following:

(A) Pay a fine as authorized by §§ 5-4-201 and 5-4-202;

(B) Make restitution as authorized by § 5-4-205; or

(C) Suspend imposition of an additional term of imprisonment, as authorized by subdivision (e)(3) of this section.

(d) A defendant convicted of an offense other than a Class Y felony, capital murder, § 5-10-101, treason, § 5-51-201, or murder in the second degree, § 5-10-103, may be sentenced to any one (1) or more of the following, except as precluded by subsection (e) of this section:

(1) Imprisonment as authorized by §§ 5-4-401 — 5-4-404;

(2) Probation as authorized by §§ 5-4-301 — 5-4-307 and 16-93-306 — 16-93-314;

(3) Payment of a fine as authorized by §§ 5-4-201 and 5-4-202;

(4) Restitution as authorized by a provision of § 5-4-205; or

(5) Imprisonment and payment of a fine.

(e)(1)(A) The court shall not suspend imposition of sentence as to a term of imprisonment nor place the defendant on probation for the following offenses:

(i) Capital murder, § 5-10-101;

(ii) Treason, § 5-51-201;

(iii) A Class Y felony, except to the extent suspension of an additional term of imprisonment is permitted in subsection (c) of this section;

(iv) Driving while intoxicated, § 5-65-103;

(v) Murder in the second degree, § 5-10-103, except to the extent suspension of an additional term of imprisonment is permitted in subsection (c) of this section; or

(vi) Engaging in a continuing criminal enterprise, § 5-64-405.

(B)(i) In any other case, the court may suspend imposition of sentence or place the defendant on probation, in accordance with



§§ 5-4-301 — 5-4-307 and 16-93-306 — 16-93-314, except as otherwise specifically prohibited by statute.

(ii) The court may not suspend execution of sentence.

(2) If the offense is punishable by fine and imprisonment, the court may sentence the defendant to pay a fine and suspend imposition of the sentence as to imprisonment or place the defendant on probation.

(3)(A) The court may sentence the defendant to a term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment.

(B) However, the court shall not sentence a defendant to imprisonment and place him or her on probation, except as authorized by § 5-4-304.

(f)(1) If the court determines that an offender under eighteen (18) years of age would be more amenable to a rehabilitation program of the Division of Youth Services of the Department of Human Services and that he or she previously has not been committed to the division on more than one (1) occasion, the court may sentence the offender under eighteen (18) years of age to the Department of Correction for a term of years, suspend the sentence, and commit him or her to the custody of the division.

(2) In a case under subdivision (f)(1) of this section, if the offender under eighteen (18) years of age completes the program of the division satisfactorily, the division shall return him or her to the sentencing court and provide the sentencing court with a written report of his or her progress and a recommendation that the offender under eighteen (18) years of age be placed on probation.

(3)(A) In the event that the offender under eighteen (18) years of age violate a rule of the division's program or facility or is otherwise not amenable to the division's rehabilitative effort, the division may return him or her to the sentencing court with a written report of his or her conduct and a recommendation that the offender under eighteen (18) years of age be transferred to the Department of Correction.

(B) If the court finds that the offender under eighteen (18) years of age has violated a rule of the division's program or facility or is otherwise not amenable to the division's rehabilitative effort, the court shall then revoke the suspension of the sentence originally imposed and commit the offender under eighteen (18) years of age to the Department of Correction.

(g) This chapter does not deprive the court of any authority conferred by law to:

- (1) Order a forfeiture of property;
- (2) Suspend or cancel a license;
- (3) Dissolve a corporation;
- (4) Remove a person from office;
- (5) Cite for contempt;
- (6) Impose any civil penalty; or
- (7) Assess costs as set forth in subsection (h) of this section.

(h) A defendant convicted of violating § 5-11-106, in which a minor was unlawfully detained, restrained, taken, enticed, or kept, may be assessed and ordered to pay expenses incurred by a law enforcement agency, the Department of Human Services, or the lawful custodian in searching for or returning the minor to the lawful custodian.

**History.** Acts 1975, No. 280, § 803; 1981, No. 620, § 7; 1983, No. 409, § 1; A.S.A. 1947, § 41-803; Acts 1987, No. 487, § 1; 1991, No. 608, §§ 1, 2; 1993, No. 192, § 1; 1993, No. 532, §§ 5, 9; 1993, No. 533, §§ 2, 3; 1993, No. 550, §§ 5, 9; 1993, No. 553, §§ 2, 3; 2001, No. 559, § 8; 2009, No. 748, § 3; 2011, No. 570, §§ 3, 4; 2011, No. 1120, §§ 1, 2; 2013, No. 1490, § 2.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Acts 2013, No. 1490, § 1, provided:

"Legislative intent.

"(a) It is the intent of the General Assembly to revise the punishments authorized for persons who are not yet eighteen

(18) years of age when they commit capital murder after the effective date of this act.

"(b) It is not the intent of the General Assembly to authorize the revised punishments for those persons who committed capital murder when they were not yet eighteen (18) years of age prior to the effective date of this act."

**Amendments.** The 2009 amendment substituted "§ 5-64-405" for "former § 5-64-414" in (e)(1)(A)(vi).

The 2011 amendment by No. 570 inserted "5-4-307 and 16-93-306 — 16-93-314" in (d)(2) and (e)(1)(B)(i).

The 2011 amendment by No. 1120 substituted "§§ 5-4-201 and 5-4-202" for "§§ 5-4-201 — 5-4-203" in (c)(2)(A) and (d)(3).

The 2013 amendment rewrote (b).

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Annual Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

## CASE NOTES

### ANALYSIS

Construction.

Fines.

Illegal Sentence.

Unauthorized Sentence.

### Construction.

Act 192 of 1993 amended subdivision (e)(1) of this section and § 5-4-301(a)(1) to permit suspension and probation as alternative sentences for certain drug offenses. *Crouse v. State*, 2012 Ark. 442, — S.W.3d —, 2012 Ark. LEXIS 467 (Nov. 29, 2012).

Where defendant was found guilty of aggravated robbery and theft of property, his sentence was enhanced by seven years pursuant to § 16-90-120 for employing a firearm in the commission of a felony. The enhancement did not violate the plain language of subsection (a) of this section, because subsection (a) and § 16-90-

120(a)-(b) can be read harmoniously to mean that § 16-90-120(a)-(b) is only a sentence enhancement, while the Arkansas Criminal Code provides the minimum sentences to be imposed for each specific offense. *Williams v. State*, 2013 Ark. App. 179, — S.W.3d — (2013), review denied, — S.W.3d —, 2013 Ark. LEXIS 211 (Ark. App. 11, 2013).

### Fines.

Court erred in failing to give defendant's proffered jury instruction allowing the jury to consider imposing a fine without imprisonment, notwithstanding his status as a habitual offender, because the model jury instruction which allowed for the jury to consider only the possibility of imprisonment when the defendant was a habitual offender did not accurately reflect the law, as it did not give the jury the option of considering only the payment of



a fine, as authorized by subdivision (d)(3) of this section. *Andrews v. State*, 2012 Ark. App. 597, — S.W.3d —, 2012 Ark. App. LEXIS 702 (Oct. 24, 2012).

### **Illegal Sentence.**

Circuit court imposed an illegal sentence upon defendant when it attempted to require him to undergo drug and alcohol treatment as a condition of his incarceration after it revoked his probation because no statute authorized the imposition of conditions upon a sentence of incarceration and thus, the circuit court lacked authority to do so. *Richie v. State*, 2009 Ark. 602, 357 S.W.3d 909 (2009).

Upon defendant's conviction for rape and second-degree battery, the circuit court erred in ordering him to complete a sex-offender treatment program because he was sentenced under §§ 5-4-401, 5-4-501 and these statutes did not authorize the court to order a sex-offender treatment program. Pursuant to § 5-4-303, a circuit court may clearly place conditions on a defendant when the court suspends the imposition of sentence or places the defendant on probation, but that there is no similar provision in subsection (d) of this section that would allow a court to place specific conditions on a sentence of incarceration. *White v. State*, 2012 Ark. 221, — S.W.3d — (2012).

Upon revoking defendant's probation for the fraudulent use of a credit or debit card, the trial court sentenced defendant to 365 days' incarceration and required her to attend a drug program. Because such a condition to incarceration was not authorized by subsection (d) of this sec-

tion, the sentence was illegal. *Runion v. State*, 2012 Ark. App. 365, — S.W.3d — (2012).

### **Unauthorized Sentence.**

Circuit court's special condition in defendant's sentence that he complete a mandatory drug treatment program while in prison was illegal as it had no authority to impose such a condition under subsection (d) of this section. Once he was sentenced, it was for the Arkansas Department of Correction to determine the conditions of his incarceration. *Cline v. State*, 2011 Ark. App. 315, — S.W.3d — (2011).

In a case involving rape and other offenses, a remand was necessary for a trial court to resolve an incongruity within the judgment and commitment order itself, which referred to conditions of a suspended sentence, despite a specification that there were no suspended imposition of sentence. If completion of a Reduction of Sexual Victimization Program was ordered as a condition of incarceration, the circuit court had the opportunity to correct it because only the Arkansas Department of Correction that could have determined any conditions of incarceration. *Dillard v. State*, 2012 Ark. App. 503, — S.W.3d — (2012).

**Cited:** *Sullivan v. State*, 366 Ark. 183, 234 S.W.3d 285 (2006); *Donaldson v. State*, 370 Ark. 3, 257 S.W.3d 74 (2007); *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918 (2010); *Jackson v. Norris*, 2013 Ark. 175, — S.W.3d — (2013); *State v. O'Quinn*, 2013 Ark. 219, — S.W.3d — (2013).

## **5-4-105. [Repealed.]**

**A.C.R.C. Notes.** Former subdivision (a)(1) of this section was amended by Acts 2011, No. 570, § 5 to delete the reference to § 5-4-311 and to insert references to § 16-90-1301 et seq. and § 16-93-314. However, Acts 2011, No. 626, § 1 specifically repealed this section, and, pursuant

to § 1-2-207(b), was the later act.

**Publisher's Notes.** This section, concerning expungement and sealing options, was repealed by Acts 2011, No. 626, § 1. The section was derived from Acts 2007, No. 744, § 1.

## **5-4-106. Extended post-conviction no contact order.**

(a) As used in this section:

(1) "Extended post-conviction no contact order" means an order issued by a court to a defendant after a conviction for an offense listed

in subsection (b) of this section that contains terms as described in subsection (d) of this section; and

(2) "Victim" means:

(A) A person against whom an offense listed in subsection (b) of this section was committed; or

(B) A family member of a person against whom capital murder, § 5-10-101, murder in the first degree, § 5-10-102, or murder in the second degree, § 5-10-103, was committed.

(b) At the request of the prosecuting attorney, a court shall determine whether to issue an extended post-conviction no contact order to a person convicted of one (1) or more of the following offenses:

(1) Capital murder, § 5-10-101, or attempted capital murder;

(2) Murder in the first degree, § 5-10-102, or attempted murder in the first degree;

(3) Murder in the second degree, § 5-10-103, or attempted murder in the second degree;

(4) Kidnapping, § 5-11-102;

(5) Battery in the first degree, § 5-13-201;

(6) Battery in the second degree, § 5-13-202;

(7) Rape, § 5-14-103;

(8) Sexual assault in the first degree, § 5-14-124;

(9) Domestic battering in the first degree, § 5-26-303; or

(10) Domestic battering in the second degree, § 5-26-304.

(c)(1) If a request is made under subsection (b) of this section, the court shall order the defendant to show cause why an extended post-conviction no contact order shall not be issued and shall hold a show cause hearing at the sentencing of the defendant.

(2) A victim has the right to be heard at the show cause hearing.

(d) If the court determines after the show cause hearing under subsection (c) of this section that the defendant should be subject to an extended post-conviction no contact order, the court shall:

(1) Enter written findings of fact and the grounds on which the extended post-conviction no contact order is issued;

(2) Determine the time period the extended post-conviction no contact order is effective, up to the life of the defendant, and include the time period in the extended post-conviction no contact order;

(3) Determine the terms described in subsection (e) of this section to be included in the extended post-conviction no contact order and include the terms in the extended post-conviction no contact order;

(4) Issue the extended post-conviction no contact order in a separate document from the judgment imposing the sentence on the defendant; and

(5) Provide a copy of the extended post-conviction no contact order to the defendant.

(e) The court may include one (1) or more of the following terms in the extended post-conviction no contact order:

(1) Order the defendant not to threaten, visit, assault, molest, or otherwise interfere with the victim;



(2) Order the defendant not to follow the victim, including at the victim's workplace;

(3) Order the defendant not to harass the victim;

(4) Order the defendant not to abuse or injure the victim;

(5) Order the defendant not to contact the victim by telephone, written communication, or electronic means; or

(6) Order the defendant to refrain from entering or remaining present at the victim's residence, school, place of employment, or other specified place at times when the victim is present.

(f)(1) An extended post-conviction no contact order entered under this section shall be enforced by a law enforcement agency without further order by the court.

(2) A law enforcement officer shall arrest and take a person into custody, with or without a warrant or other process, if the law enforcement officer has probable cause to believe that the person knowingly violated an extended post-conviction no contact order.

(g) Upon petition by either the prosecuting attorney or the person subject to the extended post-conviction no contact order, an extended post-conviction no contact order may be modified or terminated by the court if circumstances change that substantially alter:

(1) A term or condition of the extended post-conviction no contact order; or

(2) The reason for the issuance of the extended post-conviction no contact order.

(h) A person who knowingly violates an extended post-conviction no contact order upon conviction is guilty of a Class A misdemeanor.

**History.** Acts 2013, No. 1103, § 1.

## SUBCHAPTER 2 — FINES, COSTS, AND RESTITUTION

### SECTION.

5-4-201. Fines — Limitations on amount.

5-4-202. Alternative sentence prohibited  
— Time of payment.

5-4-203. [Repealed.]

### SECTION.

5-4-205. Restitution. [Effective until  
January 1, 2014.]

5-4-205. Restitution. [Effective January  
1, 2014.]

**Effective Dates.** Acts 2007, No. 346, § 2: Mar. 19, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that children and other citizens of this state are being exposed to harmful material by persons who violate obscenity laws for profit; that any person including an individual or an organization or an agent of an individual or an organization that obtains pecuniary gain from a felony violation of the obscenity laws should be

subject to an increased fine; and that this act is necessary because an increased fine will deter future felony violations of obscenity laws. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

(3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.” comes effective on and after January 1, 2014.”

Acts 2013, No. 1460, § 17: Jan. 1, 2014.

Emergency clause provided: “This act be-

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### 5-4-201. Fines — Limitations on amount.

(a) A defendant convicted of a felony may be sentenced to pay a fine:

(1) Not exceeding fifteen thousand dollars (\$15,000) if the conviction is of a Class A felony or Class B felony;

(2) Not exceeding ten thousand dollars (\$10,000) if the conviction is of a Class C felony or Class D felony;

(3) In accordance with a limitation of the statute defining the felony if the conviction is of an unclassified felony.

(b) A defendant convicted of a misdemeanor may be sentenced to pay a fine:

(1) Not exceeding two thousand five hundred dollars (\$2,500) if the conviction is of a Class A misdemeanor;

(2) Not exceeding one thousand dollars (\$1,000) if the conviction is of a Class B misdemeanor;

(3) Not exceeding five hundred dollars (\$500) if the conviction is of a Class C misdemeanor; or

(4) In accordance with a limitation of the statute defining the misdemeanor if the conviction is of an unclassified misdemeanor.

(c) A defendant convicted of a violation may be sentenced to pay a fine:

(1) Not exceeding one hundred dollars (\$100) if the violation is defined by the Arkansas Criminal Code or defined by a statute enacted subsequent to January 1, 1976, that does not prescribe a different limitation on the amount of the fine; or

(2) In accordance with a limitation of the statute defining the violation if that statute prescribes limitations on the amount of the fine.

(d)(1) Notwithstanding a limit imposed by this section, if the defendant has derived pecuniary gain from commission of an offense, then upon conviction of the offense the defendant may be sentenced to pay a fine not exceeding two (2) times the amount of the pecuniary gain.

(2) As used in this subsection, “pecuniary gain” means the amount of money or the value of property derived from the commission of the offense, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to a lawful authority prior to the time sentence is imposed.

(e) An organization convicted of an offense may be sentenced to pay a fine authorized by subsection (d) of this section or not exceeding two (2) times the maximum fine otherwise authorized upon conviction of the offense by subsection (a), (b), or (c) of this section.

(f)(1) Notwithstanding a limit imposed by this section or the section defining the felony offense, if a defendant has derived pecuniary gain



from the commission of a felony offense under § 5-68-201 et seq., § 5-68-301 et seq., the Arkansas Law on Obscenity, § 5-68-401 et seq., or § 5-68-501 et seq., then upon conviction of the felony offense, the defendant may be sentenced to pay a fine not exceeding two hundred fifty thousand dollars (\$250,000).

(2) As used in this subsection, “derived pecuniary gain” means that a defendant received income, benefit, property, money, or anything of value from the commission of a felony offense under § 5-68-201 et seq., § 5-68-301 et seq., the Arkansas Law on Obscenity, § 5-68-401 et seq., or § 5-68-501 et seq.

**History.** Acts 1975, No. 280, § 1101; A.S.A. 1947, § 41-1101; Acts 2007, No. 346, § 1; 2009, No. 209, § 1.

**Amendments.** The 2009 amendment substituted “two thousand five hundred dollars (\$2,500)” for “one thousand dollars

(\$1,000)” in (b)(1), substituted “one thousand dollars (\$1,000)” for “five hundred dollars “(\$500)” in (b)(2), and substituted “five hundred dollars “(\$500)” for “one hundred dollars (\$100)” in (b)(3).

## CASE NOTES

### ANALYSIS

Amount of Fine.

Evidence.

Sentence Appropriate.

#### Amount of Fine.

Trial court did not err in denying appellants a new trial or remittitur regarding a punitive damage award in favor of appellees, as the award was not in excess of federal due process standards, given that (1) appellees suffered economic harm, but the harm was much more than purely economic injury, as appellants cut down approximately 40 percent of appellees’ future retirement homesite and the privacy afforded by the trees was very important to appellees, (2) appellants’ action forced appellees to give up their plans to retire to the property and ultimately sell it, (3) the tree cutting was intentional and not an isolated incident, (4) the profit appellants received from the sale of their property was a direct result of the tree clearing on appellees’ property, (5) the award was not so grossly excessive as to have violated federal due process, (6) each of appellants were on notice of and could have been charged with a Class C felony of criminal mischief under § 5-38-203(b)(1) with, under subdivision (a)(2) of this section, a potential fine of \$10,000, plus a violation of § 15-32-101(a)(1), (7) was a misdemeanor, with a potential fine and jail time, and (8) under § 18-60-102(a)(1), ap-

pellants had ample notice that their actions could result in a penalty of \$25,000 punitive damages. *Bronakowski v. Lindhurst*, 2009 Ark. App. 513, 324 S.W.3d 719 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 669 (July 29, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 804 (Dec. 3, 2009).

#### Evidence.

In a capital murder case, there was sufficient evidence that defendant murdered the victim for pecuniary gain where defendant took the victim’s car, television set, silverware, Bible, and other items of personal property from her home after he killed her. *Thessing v. State*, 365 Ark. 384, 230 S.W.3d 526 (2006), cert. denied, *Thessing v. Arkansas*, 549 U.S. 891, 127 S. Ct. 193, 166 L. Ed. 2d 158 (2006).

#### Sentence Appropriate.

Sixty-day sentence for contempt based on a failure to pay child support was allowable, despite the lack of statutory authority under subdivision (b)(3) of this section, because the will of the Arkansas General Assembly was not a limitation upon the power of the trial court to inflict a reasonable punishment for disobedience. *Norman v. Cooper*, 101 Ark. App. 446, 278 S.W.3d 569 (2008).

**Cited:** *Jester v. State*, 367 Ark. 249, 239 S.W.3d 484 (2006).

**5-4-202. Alternative sentence prohibited — Time of payment.**

(a) If the defendant is sentenced to pay a fine or costs, the court shall not at the same time impose an alternative sentence or imprisonment to be served if the fine or costs are not paid.

(b)(1) If a defendant is sentenced to pay a fine or costs, the court may grant permission for payment to be made:

(A) Within a specified period of time; or

(B) In specified installments.

(2) If permission under subdivision (b)(1) of this section is not granted in the sentence, the fine or costs are payable immediately.

**History.** Acts 1975, No. 280, § 1102; A.S.A. 1947, § 41-1102; Acts 2011, No. 1120, § 3.

**Amendments.** The 2011 amendment deleted (a)(2).

**5-4-203. [Repealed.]**

**Publisher's Notes.** This section, concerning consequences of nonpayment, was repealed by Acts 2009, No. 633, § 1. The section was derived from Acts 1975, No.

280, § 1103; A.S.A. 1947, § 41-1103; Acts 1995, No. 1116, § 1; 2001, No. 1553, § 5; 2003, No. 110, § 1.

**5-4-205. Restitution. [Effective until January 1, 2014.]**

(a)(1) A defendant who is found guilty or who enters a plea of guilty or nolo contendere to an offense may be ordered to pay restitution.

(2) If the court decides not to order restitution or orders restitution of only a portion of the loss suffered by the victim, the court shall state on the record in detail the reasons for not ordering restitution or for ordering restitution of only a portion of the loss.

(b)(1) Whether a trial court or a jury, the sentencing authority shall make a determination of actual economic loss caused to a victim by the offense.

(2) When an offense has resulted in bodily injury to a victim, a restitution order entered under this section may require that the defendant:

(A) Pay the cost of a necessary medical or related professional service or device relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a recognized method of healing;

(B) Pay the cost of necessary physical and occupational therapy and rehabilitation;

(C)(i) Reimburse the victim for income lost by the victim as a result of the offense.

(ii) The maximum that a victim may recover for lost income is fifty thousand dollars (\$50,000); and

(D) Pay an amount equal to the cost of a necessary funeral and related services in the case of an offense that resulted in bodily injury that also resulted in the death of a victim.



(3) When an offense has not resulted in bodily injury to a victim, a restitution order entered under this section may require that the defendant reimburse the victim for income lost by the victim as a result of the offense.

(4)(A) The determination of the amount of loss is a factual question to be decided by the preponderance of the evidence presented to the sentencing authority during the sentencing phase of a trial.

(B) The amount of loss may be decided by agreement between a defendant and the victim represented by the prosecuting attorney.

(5) If any item listed in subdivision (b)(2) of this section has been paid by the Crime Victims Reparations Board and the court orders restitution, the restitution order shall provide that the board is to be reimbursed by the defendant.

(c)(1) As used in this section and in any provision of law relating to restitution, "victim" means any person, partnership, corporation, or governmental entity or agency that suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode.

(2) "Victim" includes a victim's estate if the victim is deceased and a victim's next of kin if the victim is deceased as a result of the offense.

(d) A record of a defendant shall not be expunged under § 16-90-901 et seq. until all court-ordered restitution has been paid.

(e)(1) Restitution shall be made immediately unless prior to the imposition of sentence the court determines that the defendant should be:

(A) Given a specified time to pay; or

(B)(i) Allowed to pay in specified installments.

(ii) If a court authorizes payment of restitution by a defendant in specified installments, a monthly installment fee of five dollars (\$5.00) shall be assessed on the defendant for making restitution payments on an installment basis in addition to the restitution and other assessments authorized.

(iii) The monthly installment fee under subdivision (e)(1)(B)(ii) of this section shall be remitted to the collecting official to be used to defray the cost of restitution collection.

(iv) A district court may order installment payments of restitution to be collected first in lieu of the procedure under § 16-10-209(5)(F).

(2) In determining the method of payment, the court shall take into account:

(A) The financial resources of the defendant and the burden that payment of restitution will impose with regard to another obligation of the defendant;

(B) The ability of the defendant to pay restitution on an installment basis or on another condition to be fixed by the court; and

(C) The rehabilitative effect on the defendant of the payment of restitution and the method of payment.

(f)(1) If the defendant is placed on probation or any form of conditional release, any restitution ordered under this section is a condition of the suspended imposition of sentence, probation, parole, or transfer.

(2) The court may revoke probation and any agency establishing a condition of release may revoke the conditional release if the defendant fails to comply with the order and if the defendant has not made a good faith effort to comply with the order.

(3) In determining whether to revoke probation or conditional release, the court or releasing authority shall consider:

- (A) The defendant's employment status;
- (B) The defendant's earning ability;
- (C) The defendant's financial resources;
- (D) The willfulness of the defendant's failure to pay; and
- (E) Any other special circumstances that may have a bearing on the defendant's ability to pay.

(g)(1) The court shall enter a judgment against the defendant for the amount determined under subdivision (b)(4) of this section.

(2) The judgment may be enforced by the state or a beneficiary of the judgment in the same manner as a judgment for money in a civil action.

(3) A judgment under this section may be discharged by a settlement between the defendant and the beneficiary of the judgment.

(4) The court shall determine priority among multiple beneficiaries on the basis of:

- (A) The seriousness of the harm each beneficiary suffered;
- (B) The other resources of the beneficiaries; and
- (C) Other equitable factors.

(5) If more than one (1) defendant is convicted of the crime for which there is a judgment under this section, the defendants are jointly and severally liable for the judgment unless the court determines otherwise.

(6)(A) A judgment shall require payment to the Department of Community Correction.

(B) The department shall provide for supervision and disbursement of funds under subdivision (g)(6)(A) of this section by the department's authorized economic sanction officers.

(h)(1) A judgment under this section does not bar a remedy available in a civil action under other law.

(2) A payment under this section shall be credited against a money judgment obtained by the beneficiary of the payment in a civil action.

(3) A determination under this section and the fact that payment was or was not ordered or made:

- (A) Are not admissible in evidence in a civil action; and
- (B) Do not affect the merits of a civil action.

**History.** Acts 1993, No. 533, § 4; 1993, No. 553, § 4; 2001, No. 1059, § 1; 2003, No. 1336, § 1; 2009, No. 633, § 2; 2009, No. 770, § 1.

**Publisher's Notes.** For text of section effective January 1, 2014, see the following version.

**Amendments.** The 2009 amendment

by No. 633, in (e)(1)(B), inserted present (e)(1)(B)(iv) and redesignated the remaining text accordingly.

The 2009 amendment by No. 770 inserted (e)(1)(B)(ii) and (e)(1)(B)(iii), and redesignated the remaining text of (e)(1)(B) accordingly.



## RESEARCH REFERENCES

**ALR.** Measure and Elements of Restitution to Which Victim is Entitled under State Criminal Statute — Payment for Installation of Alarm or Locks or Change of Locks Due to Burglary, Attempted Burglary, or Felonious Breaking and Entering. 44 A.L.R.6th 301.

Propriety, Measure, and Elements of

Restitution to Which Victim is Entitled Under State Criminal Statute — Cruelty to, Killing, or Abandonment of, Animals. 45 A.L.R.6th 435.

Mandatory Victims Restitution Act — Constitutional Issues. 20 A.L.R. Fed. 2d 239.

## CASE NOTES

## ANALYSIS

Amount of Restitution.  
Failure to Comply.  
Jurisdiction.  
Restitution Not Authorized.  
Settlement.  
"Victim."

**Amount of Restitution.**

Subdivision (a)(3)(A) of this section required that the amount of restitution defendant owed be determined by the preponderance of the evidence presented to the sentencing authority during the trial court's sentencing phase; however, no evidence was presented, only the incorrect recitation by the state of the amount of a dishonored check. *Begiri v. State*, 94 Ark. App. 45, 224 S.W.3d 575 (2006).

**Failure to Comply.**

Order revoking defendant's suspended sentences pursuant to § 5-4-309(d) was overturned where the trial court erred in failing to consider whether defendant's failure to pay fines, costs, and restitution was excusable under subdivision (f)(3) of this section; there was evidence showing that defendant had only \$60 left after monthly expenses. *Phillips v. State*, 101 Ark. App. 190, 272 S.W.3d 123 (2008).

Trial court had no jurisdiction to revoke defendant's suspended sentence because defendant owed no restitution at the end of his suspended sentence, and the trial court could not retain jurisdiction over him; defendant's child support was not to make good an actual economic loss of a victim of his failure to comply with the reporting requirements of the Sex and Child Offender Registration Act. *Owens v. State*, 2009 Ark. App. 532, 337 S.W.3d 527 (2009).

Father's suspended sentences for felony nonsupport and other crimes were prop-

erly revoked for failure to make restitution payments on child support arrearages where the father failed to pay even when employed as a cook, claimed health problems but admitted there was no disability, and submitted only a few job applications. *Thompson v. State*, 2009 Ark. App. 620, — S.W.3d — (2009).

While defendant was serving a suspended sentence for overdraft, theft of property, theft by deception, and two counts of failure to appear, he failed to pay his court-ordered restitution of \$82,000; while he made \$620 per week as a truck driver, he had to pay \$100 per week in daycare and \$400 per month in child support. Defendant's child-support obligations constituted a special circumstance bearing on his ability to pay, as contemplated by this section; nonetheless, the trial court did not err by revoking his suspended sentence for the failure to pay child support, because he testified that he made partial payments due to his mistaken understanding as to the amount due. *Reese v. State*, 2009 Ark. App. 678, — S.W.3d — (2009).

Trial court erred in revoking defendant's probation for failure to pay a child support arrearage following a conviction for felony nonsupport in violation of § 5-26-401(a) and (b)(2)(B) where defendant asserted an inability to pay and offered a disability as a reasonable excuse for his nonpayment and where the state offered no evidence of defendant's other sources of income, his assets, or his expenses. The trial court should have applied the standard found at § 5-4-309(d), in that defendant inexcusably failed to comply, as refined by the restitution-specific factors in subsection (f) of this section. *Hanna v. Arkansas*, 2009 Ark. App. 809, — S.W.3d — (2009), review denied, *Hanna v. State*,

— Ark. —, — S.W.3d —, 2010 Ark. LEXIS 93 (Feb. 12, 2010).

Judgment revoking appellant's probated sentence was affirmed where (1) despite appellant's attempt to excuse his failure to pay fines and restitution, the trial court found that appellant had committed a multitude of violations and that these violations specifically included a failure to make good-faith efforts to pay fines and restitution; and (2) there was evidence that appellant spent his money on something nonessential, alcohol, and this use of alcohol was also in violation of his terms of probation. *Barringer v. State*, 2010 Ark. App. 369, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 513 (June 2, 2010).

Circuit court properly revoked defendant's suspended sentence, pursuant to § 5-4-309, for nonpayment of court costs and fines because the state introduced, without objection, a ledger sheet reflecting defendant's nonpayment and defendant did not have a reasonable excuse for failing to pay, pursuant to subdivision (f)(3) of this section; the state proved defendant's failure to pay was inexcusable. *Burkhart v. State*, 2010 Ark. App. 462, — S.W.3d — (2010).

Circuit court did not err in revoking the suspended sentence defendant received for second-degree forgery because the circuit court's finding that defendant's failure to pay restitution, a fine, and court costs was both willful and inexcusable was not clearly against the preponderance of the evidence; the circuit court could find that defendant was capable of working, that he was employed in some capacity, and that he received income from the government, and instead of meeting his financial obligations, defendant chose to spend money on nonessential items such as alcohol and cigarettes. *Wicks v. State*, 2010 Ark. App. 499, 375 S.W.3d 769 (2010).

Trial court did not err in continuing defendant's probation for failure to pay restitution as ordered, despite defendant's argument that she was looking for work, that she was seeking to have her theft conviction overturned, and that she was trying to get disability, all of which claims were seriously undermined by the state. *Newsom v. State*, 2011 Ark. App. 760, 387 S.W.3d 245 (2011), rehearing denied, —

S.W.3d —, 2012 Ark. App. LEXIS 75 (Ark. Ct. App. Jan. 4, 2012).

Appellant did not dispute that he did not pay known obligations and he acknowledged his income allowed him to pay, and it was the trial court's decision to determine the weight and credibility of the evidence; the trial court's findings in revoking appellant's suspended sentence for purposes of subdivision (f)(3) of this section were not clearly against the evidence. *Reyes v. State*, 2012 Ark. App. 358, — S.W.3d — (2012).

### **Jurisdiction.**

Court retained jurisdiction to revoke the suspended sentence for failure to pay restitution, because the petitioner was charged with fleeing to avoid arrest for possession of marijuana and causing property damage while fleeing, and was ordered to pay restitution for the damage he caused during the course of the criminal episode. *Arter v. State*, 2012 Ark. App. 327, — S.W.3d — (2012).

### **Restitution Not Authorized.**

Because the trial court lacked the authority to order restitution in a proceeding for revocation of a suspended sentence, pursuant to subdivision (a)(1) of this section, defendant's sentence was modified to delete the restitution provision. Otherwise, his ten-year sentence was affirmed. *Simpson v. State*, 2010 Ark. App. 33, — S.W.3d — (2010).

### **Settlement.**

Where defendant was convicted of battery and ordered to pay \$40,304.35 in restitution, the release signed by the victim in the civil suit when she received \$25,000 from the insurance company did not prevent the court from ordering defendant to pay the remaining restitution obligation of \$10,708.94; because the plain language of the release revealed absolutely no mention of the restitution order under subdivision (g)(3) of this section was inapplicable. *Moore v. State*, 2012 Ark. 350, — S.W.3d — (2012).

### **"Victim."**

After defendant was convicted of four counts of cruelty to animals, a trial court properly ordered defendant to pay \$5,091 in restitution to an equine humane society because the humane society was a victim under subdivision (c)(1) of this section; the



humane society incurred monetary expense as a result of defendant's cruelty to horses when it cared for and obtained treatment for the horses following their seizure. *Brown v. State*, 375 Ark. 499, 292 S.W.3d 288 (2009).

Car's insurer, which was required to pay compensation to the owner of the car

as an indirect result of defendant's crime of fleeing and theft by receiving the car after defendant wrecked the car, rendering it a total loss, was a "victim" and an "aggrieved party" entitled to restitution under this section and § 5-4-303. *Singleton v. State*, 2009 Ark. 594, 357 S.W.3d 891 (2009).

#### **5-4-205. Restitution. [Effective January 1, 2014.]**

(a)(1) A defendant who is found guilty or who enters a plea of guilty or nolo contendere to an offense may be ordered to pay restitution.

(2) If the court decides not to order restitution or orders restitution of only a portion of the loss suffered by the victim, the court shall state on the record in detail the reasons for not ordering restitution or for ordering restitution of only a portion of the loss.

(b)(1) Whether a trial court or a jury, the sentencing authority shall make a determination of actual economic loss caused to a victim by the offense.

(2) When an offense has resulted in bodily injury to a victim, a restitution order entered under this section may require that the defendant:

(A) Pay the cost of a necessary medical or related professional service or device relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a recognized method of healing;

(B) Pay the cost of necessary physical and occupational therapy and rehabilitation;

(C)(i) Reimburse the victim for income lost by the victim as a result of the offense.

(ii) The maximum that a victim may recover for lost income is fifty thousand dollars (\$50,000); and

(D) Pay an amount equal to the cost of a necessary funeral and related services in the case of an offense that resulted in bodily injury that also resulted in the death of a victim.

(3) When an offense has not resulted in bodily injury to a victim, a restitution order entered under this section may require that the defendant reimburse the victim for income lost by the victim as a result of the offense.

(4)(A) The determination of the amount of loss is a factual question to be decided by the preponderance of the evidence presented to the sentencing authority during the sentencing phase of a trial.

(B) The amount of loss may be decided by agreement between a defendant and the victim represented by the prosecuting attorney.

(5) If any item listed in subdivision (b)(2) of this section has been paid by the Crime Victims Reparations Board and the court orders restitution, the restitution order shall provide that the board is to be reimbursed by the defendant.

(c)(1) As used in this section and in any provision of law relating to restitution, "victim" means any person, partnership, corporation, or

governmental entity or agency that suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode.

(2) "Victim" includes a victim's estate if the victim is deceased and a victim's next of kin if the victim is deceased as a result of the offense.

(d) A record of a defendant shall not be sealed under the Comprehensive Criminal Record Sealing Act of 2013, § 16-90-1401 et seq., until all court-ordered restitution has been paid.

(e)(1) Restitution shall be made immediately unless prior to the imposition of sentence the court determines that the defendant should be:

(A) Given a specified time to pay; or

(B)(i) Allowed to pay in specified installments.

(ii) If a court authorizes payment of restitution by a defendant in specified installments, a monthly installment fee of five dollars (\$5.00) shall be assessed on the defendant for making restitution payments on an installment basis in addition to the restitution and other assessments authorized.

(iii) The monthly installment fee under subdivision (e)(1)(B)(ii) of this section shall be remitted to the collecting official to be used to defray the cost of restitution collection.

(iv) A district court may order installment payments of restitution to be collected first in lieu of the procedure under § 16-10-209(5)(F).

(2) In determining the method of payment, the court shall take into account:

(A) The financial resources of the defendant and the burden that payment of restitution will impose with regard to another obligation of the defendant;

(B) The ability of the defendant to pay restitution on an installment basis or on another condition to be fixed by the court; and

(C) The rehabilitative effect on the defendant of the payment of restitution and the method of payment.

(f)(1) If the defendant is placed on probation or any form of conditional release, any restitution ordered under this section is a condition of the suspended imposition of sentence, probation, parole, or transfer.

(2) The court may revoke probation and any agency establishing a condition of release may revoke the conditional release if the defendant fails to comply with the order and if the defendant has not made a good faith effort to comply with the order.

(3) In determining whether to revoke probation or conditional release, the court or releasing authority shall consider:

(A) The defendant's employment status;

(B) The defendant's earning ability;

(C) The defendant's financial resources;

(D) The willfulness of the defendant's failure to pay; and

(E) Any other special circumstances that may have a bearing on the defendant's ability to pay.

(g)(1) The court shall enter a judgment against the defendant for the amount determined under subdivision (b)(4) of this section.



(2) The judgment may be enforced by the state or a beneficiary of the judgment in the same manner as a judgment for money in a civil action.

(3) A judgment under this section may be discharged by a settlement between the defendant and the beneficiary of the judgment.

(4) The court shall determine priority among multiple beneficiaries on the basis of:

- (A) The seriousness of the harm each beneficiary suffered;
- (B) The other resources of the beneficiaries; and
- (C) Other equitable factors.

(5) If more than one (1) defendant is convicted of the crime for which there is a judgment under this section, the defendants are jointly and severally liable for the judgment unless the court determines otherwise.

(6)(A) A judgment shall require payment to the Department of Community Correction.

(B) The department shall provide for supervision and disbursement of funds under subdivision (g)(6)(A) of this section by the department's authorized economic sanction officers.

(h)(1) A judgment under this section does not bar a remedy available in a civil action under other law.

(2) A payment under this section shall be credited against a money judgment obtained by the beneficiary of the payment in a civil action.

(3) A determination under this section and the fact that payment was or was not ordered or made:

- (A) Are not admissible in evidence in a civil action; and
- (B) Do not affect the merits of a civil action.

**History.** Acts 1993, No. 533, § 4; 1993, No. 553, § 4; 2001, No. 1059, § 1; 2003, No. 1336, § 1; 2009, No. 633, § 2; 2009, No. 770, § 1; 2013, No. 1460, § 1.

**Publisher's Notes.** For text of section effective until January 1, 2014, see the preceding version.

**Amendments.** The 2013 amendment,

in (d), substituted "sealed" for "expunged"; and "the Comprehensive Criminal Record Sealing Act of 2013, § 16-90-1401" for "§ 16-90-901."

**Effective Dates.** Acts 2013, No. 1460, § 17: Jan. 1, 2014. Emergency clause provided: "This act becomes effective on and after January 1, 2014."

## RESEARCH REFERENCES

**ALR.** Measure and Elements of Restitution to Which Victim is Entitled under State Criminal Statute — Payment for Installation of Alarm or Locks or Change of Locks Due to Burglary, Attempted Burglary, or Felonious Breaking and Entering. 44 A.L.R.6th 301.

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## CASE NOTES

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Amount of Restitution.

Failure to Comply.

Jurisdiction.

Restitution Not Authorized.

Settlement.

"Victim."

**Amount of Restitution.**

Subdivision (a)(3)(A) of this section required that the amount of restitution defendant owed be determined by the preponderance of the evidence presented to the sentencing authority during the trial court's sentencing phase; however, no evidence was presented, only the incorrect recitation by the state of the amount of a dishonored check. *Beqiri v. State*, 94 Ark. App. 45, 224 S.W.3d 575 (2006).

**Failure to Comply.**

Order revoking defendant's suspended sentences pursuant to § 5-4-309(d) was overturned where the trial court erred in failing to consider whether defendant's failure to pay fines, costs, and restitution was excusable under subdivision (f)(3) of this section; there was evidence showing that defendant had only \$60 left after monthly expenses. *Phillips v. State*, 101 Ark. App. 190, 272 S.W.3d 123 (2008).

Trial court had no jurisdiction to revoke defendant's suspended sentence because defendant owed no restitution at the end of his suspended sentence, and the trial court could not retain jurisdiction over him; defendant's child support was not to make good an actual economic loss of a victim of his failure to comply with the reporting requirements of the Sex and Child Offender Registration Act. *Owens v. State*, 2009 Ark. App. 532, 337 S.W.3d 527 (2009).

Father's suspended sentences for felony nonsupport and other crimes were properly revoked for failure to make restitution payments on child support arrearages where the father failed to pay even when employed as a cook, claimed health problems but admitted there was no disability, and submitted only a few job applications. *Thompson v. State*, 2009 Ark. App. 620, — S.W.3d — (2009).

While defendant was serving a suspended sentence for overdraft, theft of

property, theft by deception, and two counts of failure to appear, he failed to pay his court-ordered restitution of \$82,000; while he made \$620 per week as a truck driver, he had to pay \$100 per week in daycare and \$400 per month in child support. Defendant's child-support obligations constituted a special circumstance bearing on his ability to pay, as contemplated by this section; nonetheless, the trial court did not err by revoking his suspended sentence for the failure to pay child support, because he testified that he made partial payments due to his mistaken understanding as to the amount due. *Reese v. State*, 2009 Ark. App. 678, — S.W.3d — (2009).

Trial court erred in revoking defendant's probation for failure to pay a child support arrearage following a conviction for felony nonsupport in violation of § 5-26-401(a) and (b)(2)(B) where defendant asserted an inability to pay and offered a disability as a reasonable excuse for his nonpayment and where the state offered no evidence of defendant's other sources of income, his assets, or his expenses. The trial court should have applied the standard found at § 5-4-309(d), in that defendant inexcusably failed to comply, as refined by the restitution-specific factors in subsection (f) of this section. *Hanna v. Arkansas*, 2009 Ark. App. 809, — S.W.3d — (2009), review denied, *Hanna v. State*, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 93 (Feb. 12, 2010).

Judgment revoking appellant's probated sentence was affirmed where (1) despite appellant's attempt to excuse his failure to pay fines and restitution, the trial court found that appellant had committed a multitude of violations and that these violations specifically included a failure to make good-faith efforts to pay fines and restitution; and (2) there was evidence that appellant spent his money on something nonessential, alcohol, and this use of alcohol was also in violation of his terms of probation. *Barringer v. State*, 2010 Ark. App. 369, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 513 (June 2, 2010).

Circuit court properly revoked defendant's suspended sentence, pursuant to



§ 5-4-309, for nonpayment of court costs and fines because the state introduced, without objection, a ledger sheet reflecting defendant's nonpayment and defendant did not have a reasonable excuse for failing to pay, pursuant to subdivision (f)(3) of this section; the state proved defendant's failure to pay was inexcusable. *Burkhart v. State*, 2010 Ark. App. 462, — S.W.3d — (2010).

Circuit court did not err in revoking the suspended sentence defendant received for second-degree forgery because the circuit court's finding that defendant's failure to pay restitution, a fine, and court costs was both willful and inexcusable was not clearly against the preponderance of the evidence; the circuit court could find that defendant was capable of working, that he was employed in some capacity, and that he received income from the government, and instead of meeting his financial obligations, defendant chose to spend money on nonessential items such as alcohol and cigarettes. *Wicks v. State*, 2010 Ark. App. 499, 375 S.W.3d 769 (2010).

Trial court did not err in continuing defendant's probation for failure to pay restitution as ordered, despite defendant's argument that she was looking for work, that she was seeking to have her theft conviction overturned, and that she was trying to get disability, all of which claims were seriously undermined by the state. *Newsom v. State*, 2011 Ark. App. 760, 387 S.W.3d 245 (2011), rehearing denied, — S.W.3d —, 2012 Ark. App. LEXIS 75 (Ark. Ct. App. Jan. 4, 2012).

Appellant did not dispute that he did not pay known obligations and he acknowledged his income allowed him to pay, and it was the trial court's decision to determine the weight and credibility of the evidence; the trial court's findings in revoking appellant's suspended sentence for purposes of subdivision (f)(3) of this section were not clearly against the evidence. *Reyes v. State*, 2012 Ark. App. 358, — S.W.3d — (2012).

### **Jurisdiction.**

Court retained jurisdiction to revoke the suspended sentence for failure to pay restitution, because the petitioner was charged with fleeing to avoid arrest for

possession of marijuana and causing property damage while fleeing, and was ordered to pay restitution for the damage he caused during the course of the criminal episode. *Arter v. State*, 2012 Ark. App. 327, — S.W.3d — (2012).

### **Restitution Not Authorized.**

Because the trial court lacked the authority to order restitution in a proceeding for revocation of a suspended sentence, pursuant to subdivision (a)(1) of this section, defendant's sentence was modified to delete the restitution provision. Otherwise, his ten-year sentence was affirmed. *Simpson v. State*, 2010 Ark. App. 33, — S.W.3d — (2010).

### **Settlement.**

Where defendant was convicted of battery and ordered to pay \$40,304.35 in restitution, the release signed by the victim in the civil suit when she received \$25,000 from the insurance company did not prevent the court from ordering defendant to pay the remaining restitution obligation of \$10,708.94; because the plain language of the release revealed absolutely no mention of the restitution order under subdivision (g)(3) of this section was inapplicable. *Moore v. State*, 2012 Ark. 350, — S.W.3d — (2012).

### **"Victim."**

After defendant was convicted of four counts of cruelty to animals, a trial court properly ordered defendant to pay \$5,091 in restitution to an equine humane society because the humane society was a victim under subdivision (c)(1) of this section; the humane society incurred monetary expense as a result of defendant's cruelty to horses when it cared for and obtained treatment for the horses following their seizure. *Brown v. State*, 375 Ark. 499, 292 S.W.3d 288 (2009).

Car's insurer, which was required to pay compensation to the owner of the car as an indirect result of defendant's crime of fleeing and theft by receiving the car after defendant wrecked the car, rendering it a total loss, was a "victim" and an "aggrieved party" entitled to restitution under this section and § 5-4-303. *Singleton v. State*, 2009 Ark. 594, 357 S.W.3d 891 (2009).

**SUBCHAPTER 3 — SUSPENSION OR PROBATION**

## SECTION.

- 5-4-301. Crimes for which suspension or probation prohibited — Criteria for suspension or probation in other cases.
- 5-4-303. Conditions of suspension or probation.
- 5-4-304. Confinement as condition of suspension or probation.
- 5-4-306. Time period generally.
- 5-4-308. [Repealed.]
- 5-4-309. [Repealed.]
- 5-4-310. [Repealed.]

## SECTION.

- 5-4-311. [Repealed.]
- 5-4-312. Presentence investigation — Placement in a community correction program.
- 5-4-313. Placement in a drug treatment program — Drug court alternative.
- 5-4-323. Additional conditions — High school diploma or general education development certificate — Employment training.

**5-4-301. Crimes for which suspension or probation prohibited — Criteria for suspension or probation in other cases.**

(a)(1) A court shall not suspend imposition of sentence as to a term of imprisonment or place a defendant on probation for the following offenses:

- (A) Capital murder, § 5-10-101;
- (B) Treason, § 5-51-201;
- (C) A Class Y felony, except to the extent suspension of an additional term of imprisonment is permitted in § 5-4-104(c);
- (D) Driving while intoxicated, § 5-65-103;
- (E) Murder in the second degree, § 5-10-103, except to the extent suspension of an additional term of imprisonment is permitted in § 5-4-104(c); or
- (F) Engaging in a continuing criminal enterprise, § 5-64-405.

(2) If it is determined pursuant to § 5-4-502 that a defendant has previously been convicted of two (2) or more felonies, the court shall not:

- (A) Suspend imposition of sentence; or
- (B) Place the defendant on probation.

(b) In making a determination as to suspension or probation, the court shall consider whether:

- (1) There is undue risk that during the period of a suspension or probation the defendant will commit another offense;
- (2) The defendant is in need of correctional treatment that can be provided most effectively by his or her commitment to an institution;
- (3) Suspension or probation will discount the seriousness of the defendant's offense; or
- (4) The defendant has the means available or is so gainfully employed that restitution or compensation to the victim of the defendant's offense will not cause an unreasonable financial hardship and will be beneficial to the rehabilitation of the defendant.

(c) While not controlling the discretion of the court, the following grounds shall be accorded weight in favor of suspension or probation:

- (1) The defendant's conduct neither caused nor threatened serious harm;



- (2) The defendant did not contemplate that his or her conduct would cause or threaten serious harm;
  - (3) The defendant acted under strong provocation;
  - (4) There was a substantial ground tending to excuse or justify the defendant's conduct, though failing to establish a defense;
  - (5) The victim of the offense induced or facilitated its commission;
  - (6) The defendant has compensated or will compensate the victim of the offense for the damage or injury that the victim sustained;
  - (7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense;
  - (8) The defendant's conduct was the result of circumstances unlikely to recur;
  - (9) The character and attitude of the defendant indicate that he or she is unlikely to commit another offense;
  - (10) The defendant is particularly likely to respond affirmatively to suspension or probation;
  - (11) The imprisonment of the defendant would entail excessive hardship to the defendant or to a dependent of the defendant;
  - (12) The defendant is elderly or in poor health; or
  - (13) The defendant cooperated with law enforcement authorities in his or her own prosecution or in bringing another offender to justice.
- (d)(1) When the court suspends the imposition of sentence on a defendant or places him or her on probation, the court shall enter a judgment of conviction only if the court sentences the defendant to:
- (A) Pay a fine and suspends imposition of sentence as to imprisonment or places the defendant on probation; or
  - (B) A term of imprisonment and suspends imposition of sentence as to an additional term of imprisonment.
- (2) The entry of a judgment of conviction does not preclude:
- (A) The modification of the original order suspending the imposition of sentence on a defendant or placing a defendant on probation following a revocation hearing held pursuant to § 16-93-307; and
  - (B) A modification set within the limits of §§ 16-93-309 and 16-93-312.

**History.** Acts 1975, No. 280, § 1201; 1977, No. 474, §§ 2, 8; 1977, No. 482, § 2; A.S.A. 1947, § 41-1201; Acts 1991, No. 608, § 3; 1993, No. 192, § 2; 1999, No. 1569, § 1; 2009, No. 748, § 4; 2011, No. 570, § 6.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce re-

cidivism, hold offenders accountable, and contain correction costs."

**Amendments.** The 2009 amendment substituted "§ 5-64-405" for "former § 5-64-414" in (a)(1)(F).

The 2011 amendment substituted "§ 16-93-307" for "§ 5-4-310" in (d)(2)(A); and substituted "§ 16-93-309 and § 16-93-312" for "§§ 5-4-303, 5-4-304, and 5-4-306" in (d)(2)(B).

## CASE NOTES

## ANALYSIS

Court's Authority.

Drug Offenses.

Modification.

Suspension of Sentence.

**Court's Authority.**

Since defendant pled guilty to a Class C felony as a habitual offender, the circuit court was required to sentence her in accordance with subdivision (a)(2) of this section and § 5-4-501(a)(2)(D), and the circuit court exceeded its statutory authority when it placed defendant on probation; defendant knew about the statute's sentencing range and, at the time of defendant's plea in open court, the circuit court expressly reiterated that her offense carried with it a sentencing range of three to twenty years' imprisonment. *State v. Joslin*, 364 Ark. 545, 222 S.W.3d 168 (2006).

Circuit court did not err in revoking defendant's suspended sentence and probation and in sentencing him to 197 months imprisonment with forty-seven months suspended because the circuit court was within its authority to revoke the original sentences and prescribe the resulting sentence and was also within its authority to run the prescribed sentences consecutively when the prescribed sentence in the first case, thirty months with an additional forty-seven months' suspended, was within the circuit court's authority; because defendant was convicted of a Class C felony, the circuit court could have originally sentenced him to ten years' imprisonment for failure to appear pursuant to § 5-4-401(a)(4), the sentence imposed as a result of revocation in the second case did not exceed the statutory maximum for the underlying offense and was not illegal on its face, and a notation on the judgment and disposition order in the second case was an insufficient basis for defendant's allegation that the circuit court unambiguously intended to impose a presumptive sentence of thirty-six months in the event he failed to comply with the conditions of his probation. *Ward v. State*, 2010 Ark. App. 79, 374 S.W.3d 62 (2010).

Where defendant was guilty of violating § 5-64-401(a)(1) (repealed by 2011 Ark.

Acts 570, § 33) and § 5-64-403(c)(5) and the circuit court sentenced him as a habitual offender pursuant to the § 5-4-501, the sentence was nonetheless illegal because under subdivision (a)(2) of this section, the circuit court did not have the authority to suspend 10 years of the 15-year sentence it imposed. *State v. O'Quinn*, 2013 Ark. 219, — S.W.3d — (2013).

**Drug Offenses.**

Act 192 of 1993 amended §§ 5-4-104(e)(1) and subdivision (a)(1) of this section to permit suspension and probation as alternative sentences for certain drug offenses. *Crouse v. State*, 2012 Ark. 442, — S.W.3d —, 2012 Ark. LEXIS 467 (Nov. 29, 2012).

**Modification.**

Upon the revocation of defendant's probation for eight violations of the Arkansas Hot Check Law, the trial court was authorized under subdivision (d)(2) of this section and § 5-4-309(f)(1)(A) to modify the original order and impose multiple sentences of imprisonment to be served consecutively in accordance with § 5-4-403(a). The trial court did not err by sentencing defendant to twenty years in prison each on four hot-check counts to run consecutively and ten years in prison each on the other felony hot-check counts to run concurrently. *Maldonado v. State*, 2009 Ark. 432, — S.W.3d — (2009).

**Suspension of Sentence.**

There was no violation of appellant's due process rights for entitlement to habeas relief where appellant had been sentenced to five years' probation and fined for first-degree sexual abuse, a trial court properly sentenced him to 10 years in prison upon revocation of probation under § 5-4-309(f) because appellant could have originally received that term under §§ 5-14-108, 5-4-401(a)(4) and there had been no sentence imposed that had been improperly modified under §§ 5-4-301(d) (1997), or 16-93-402(e). *Rickenbacker v. Norris*, 361 Ark. 291, 206 S.W.3d 220 (2005).

**Cited:** *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007).



**5-4-303. Conditions of suspension or probation.**

(a) If a court suspends imposition of sentence on a defendant or places him or her on probation, the court shall attach such conditions as are reasonably necessary to assist the defendant in leading a law-abiding life.

(b) The court shall provide as an express condition of every suspension or probation that the defendant not commit an offense punishable by imprisonment during the period of suspension or probation.

(c) If the court suspends imposition of sentence on a defendant or places him or her on probation, as a condition of its order the court may require that the defendant:

(1) Support his or her dependents and meet his or her family responsibilities;

(2) Work faithfully at suitable employment;

(3) Pursue a prescribed secular course of study or vocational training designed to equip him or her for suitable employment;

(4) Undergo available medical or psychiatric treatment and enter and remain in a specified institution when required for medical or psychiatric treatment;

(5) Participate in a community-based rehabilitative program or work-release program that uses practices proven to reduce recidivism and for which the court may impose a reasonable fee or assessment on the defendant to be used in support of the community-based rehabilitative program or work-release program;

(6) Refrain from frequenting an unlawful or designated place or consorting with a designated person;

(7) Have no firearm in his or her possession;

(8) Make restitution to an aggrieved party in an amount the defendant can afford to pay for the actual loss or damage caused by his or her offense;

(9) Post a bond, with or without surety, conditioned on the performance of a prescribed condition; and

(10) Satisfy any other condition reasonably related to the rehabilitation of the defendant and not unduly restrictive of his or her liberty or incompatible with his or her freedom of conscience.

(d) If the court places a defendant on probation, as a condition of its order the court may require that the defendant:

(1) Report as directed to the court or the probation officer and permit the probation officer to visit the defendant at the defendant's place of employment or elsewhere;

(2) Remain within the jurisdiction of the court unless granted permission to leave by the court or the probation officer; and

(3) Answer any reasonable inquiry by the court or the probation officer and promptly notify the court or probation officer of any change in address or employment.

(e) If the court suspends imposition of sentence on a defendant or places him or her on probation, the defendant shall be given a written

statement explicitly setting forth the conditions under which he or she is being released.

(f)(1) If the court suspends imposition of sentence on a defendant or places him or her on probation conditioned upon his or her making restitution under subdivision (c)(8) of this section, the court, by concurrence of the victim, defendant, and the prosecuting authority, shall determine the amount to be paid as restitution.

(2) After considering the assets, financial condition, and occupation of the defendant, the court shall further determine:

(A) Whether restitution shall be total or partial;

(B) The amounts to be paid if by periodic payments; and

(C) If a personal service is contemplated, the reasonable value and rate of compensation for the personal service rendered to the victim.

(g)(1) In a case in which counsel has been appointed to represent a defendant due to the defendant's indigency and the court suspends imposition of sentence or places a defendant on probation at the time of disposition, the court shall revisit the issue of the defendant's indigency.

(2)(A) When appropriate and when the defendant is financially able to do so, the court may assess an attorney's fee to be paid by the defendant as part of his or her suspension or probation.

(B) The amount of the assessed attorney's fee shall be commensurate with the defendant's ability to pay.

(C) The assessed attorney's fee shall be paid to the state as a means of partial reimbursement for providing appointed counsel.

(3) In no event is failure to pay an assessed attorney's fee, standing alone, a ground for the revocation of a suspension or probation.

(4)(A) The assessed attorney's fee under subdivision (g)(2) of this section shall be collected by the county or city official, agency, or department designated under § 16-13-709 as primarily responsible for the collection of fines assessed in a circuit court or district court of this state.

(B) On or before the tenth day of each month, the county or city official, agency, or department described in subdivision (g)(4)(A) of this section shall remit any assessed attorney's fee collected to the Arkansas Public Defender Commission on a form provided by the commission.

(C) The commission shall deposit the money collected into a separate account within the State Central Services Fund to be known as "Public Defender Attorney Fees" to be used solely to defray costs for the commission.

**History.** Acts 1975, No. 280, § 1203; 1977, No. 474, §§ 3, 9; 1977, No. 482, § 3; 1985, No. 315, § 1; A.S.A. 1947, § 41-1203; Acts 1989, No. 305, § 1; 1993, No. 119, § 1; 1997, No. 281, § 1; 1999, No. 231, § 1; 1999, No. 1564, § 6; 1999, No. 1569, § 2; 2003, No. 1765, § 1; 2011, No. 570, § 7.

**A.C.R.C. Notes.** Acts 2011, No. 570,

§ 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Acts 2013, No. 1394, § 9, provided: Fee Generation and Support—Courts.

"Unless specified otherwise in Arkansas Code §5-4-303(g) and Arkansas Code 16-



87-213 the monies collected by the courts under the authority of §5-4-303(g) and 16-87-213 shall be deposited into the State Treasury to the credit of the State Central Services Fund.

"In the event that the law requires that the fees levied under §5-4-303(g) be deposited into the State Administration of Justice Fund, the State Treasurer shall transfer the amount of the fees collected each month under the authority of Arkansas Code §5-4-303(g) from the State Adminis-

tration of Justice Fund to the State Central Services Fund.

"The provisions of this section shall be in effect only from July 1, 2013 through June 30, 2014."

**Amendments.** The 2011 amendment substituted "uses practices proven to reduce recidivism" for "meets the minimum state standards for certification" in (c)(5); deleted former (d), (f) and (j) and redesignated the remaining subsections accordingly; and rewrote present (f).

## RESEARCH REFERENCES

**ALR.** Propriety of Requirement, as Condition of Probation, That Defendant

Refrain from Use of Intoxicants. 46 A.L.R.6th 241.

## CASE NOTES

### ANALYSIS

Modification.

No Cause for Revocation.

Rehabilitation Program.

Restitution or Reparation.

Sentence Upon Revocation of Suspension.

Statement of Conditions.

Unauthorized Sentence.

Validity of Conditions.

Written Notice.

### Modification.

Trial court lacked authority, pursuant to subdivision (d)(2) of this section, to lengthen defendant's probationary period where defendant had made progress in the drug-court program under the Drug Court Act, § 16-98-301 et seq., because the trial court did not hold a revocation hearing pursuant to § 5-4-310. *Cross v. State*, 2009 Ark. 597, — S.W.3d — (2009).

### No Cause for Revocation.

Trial court had no jurisdiction to revoke defendant's suspended sentence, because defendant owed no restitution at the end of his suspended sentence, and the trial court could not retain jurisdiction over him; defendant's child support was not to make good an actual economic loss of a victim of his failure to comply with the reporting requirements of the Sex and Child Offender Registration Act. *Owens v. State*, 2009 Ark. App. 532, 337 S.W.3d 527 (2009).

### Rehabilitation Program.

Trial court properly revoked defendant's suspended sentence for sexual abuse and sentenced defendant to six years in prison because it was undisputed that defendant never completed the Arkansas Reduction of Sexual Victimization Program, which was a condition of the suspended sentence pursuant to subsection (g) of this section. *Seamster v. State*, 2009 Ark. 258, 308 S.W.3d 567 (2009), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 425 (June 18, 2009).

### Restitution or Reparation.

Car's insurer, which was required to pay compensation to the owner of the car as an indirect result of defendant's crime of fleeing and theft by receiving the car after defendant wrecked the car, rendering it a total loss, was a "victim" and an "aggrieved party" entitled to restitution under § 5-4-205 and this section. *Singleton v. State*, 2009 Ark. 594, 357 S.W.3d 891 (2009).

Trial court did not err in continuing defendant's probation for failure to pay restitution as ordered, despite defendant's argument that she was looking for work, that she was seeking to have her theft conviction overturned, and that she was trying to get disability, all of which claims were seriously undermined by the state. *Newsom v. State*, 2011 Ark. App. 760, 387 S.W.3d 245 (2011), rehearing denied, — S.W.3d —, 2012 Ark. App. LEXIS 75 (Ark. Ct. App. Jan. 4, 2012).

Court retained jurisdiction to revoke the suspended sentence for failure to pay restitution, because the petitioner was charged with fleeing to avoid arrest for possession of marijuana and causing property damage while fleeing, and was ordered to pay restitution for the damage he caused during the course of the criminal episode. *Arter v. State*, 2012 Ark. App. 327, — S.W.3d — (2012).

Trial court was without jurisdiction to revoke defendant's suspended sentence for fourth offense DWI, because the period of the suspended sentence had expired two years prior to the state filing a petition for revocation. Defendant was not ordered to pay restitution, so jurisdiction could not be continued under subdivision (h)(2) of this section. *Wallace v. State*, 2012 Ark. App. 571, — S.W.3d — (2012).

### **Sentence Upon Revocation of Suspension.**

When defendant was serving a suspended sentence for overdraft, theft of property, theft by deception, and two counts of failure to appear, he failed to pay his court-ordered restitution of \$82,000; the trial court did not err by revoking his suspended sentence. While this section permitted the trial court to fashion an alternative remedy that did not involve incarceration, the trial court sentenced defendant to ten years in the Arkansas Department of Correction. *Reese v. State*, 2009 Ark. App. 678, — S.W.3d — (2009).

### **Statement of Conditions.**

Decision to revoke probation due to a probationer's failure to comply with conditions was proper because written conditions were provided probationer as required by subsection (g) of this section; there was evidence that the conditions were expressly communicated in writing and verbally to the probationer; and there was no evidence of confusion on the probationer's part. *White v. State*, 2010 Ark. App. 157, — S.W.3d — (2010).

### **Unauthorized Sentence.**

Upon defendant's conviction for rape and second-degree battery, the circuit court erred in ordering him to complete a sex-offender treatment program because he was sentenced under §§ 5-4-401, 5-4-501 and these statutes did not authorize the court to order a sex-offender treatment program. Pursuant to this section, a

circuit court may clearly place conditions on a defendant when the court suspends the imposition of sentence or places the defendant on probation, but that there is no similar provision in § 5-4-104(d) that would allow a court to place specific conditions on a sentence of incarceration. *White v. State*, 2012 Ark. 221, — S.W.3d — (2012).

Upon revoking defendant's probation for the fraudulent use of a credit or debit card, the trial court sentenced defendant to 365 days' incarceration and required her to attend a drug program. Because defendant was not sentenced to probation, the condition to incarceration was not authorized by subdivision (d)(4) of this section; therefore, the sentence was illegal. *Runion v. State*, 2012 Ark. App. 365, — S.W.3d — (2012).

In a case involving rape and other offenses, a remand was necessary for a trial court to resolve an incongruity within the judgment and commitment order itself, which referred to conditions of a suspended sentence, despite a specification that there were no suspended imposition of sentence. If completion of a Reduction of Sexual Victimization Program was ordered as a condition of incarceration, the circuit court had the opportunity to correct it because only the Arkansas Department of Correction that could have determined any conditions of incarceration. *Dillard v. State*, 2012 Ark. App. 503, — S.W.3d — (2012).

### **Validity of Conditions.**

In a case dealing with domestic offenses, although the jury was permitted to recommend an alternative sentence under § 16-97-101(4), the trial court had the discretion as to whether to impose it; thus, the trial court was permitted to accept a jury's recommended alternative sentences of probation and suspended sentences and then impose fines as a condition of those sentences, pursuant to this section. *Sullivan v. State*, 366 Ark. 183, 234 S.W.3d 285 (2006).

### **Written Notice.**

Revocation of probation on forgery and battery charges was proper because probationer's signature on the documents listing the conditions of probation was sufficient to support the trial court's determination that the probationer had been



provided the conditions, pursuant to subsection (g) of this section, and knew, understood, and consented to the conditions. *Berry v. State*, 2010 Ark. App. 217, — S.W.3d — (2010).

Trial court did not err in revoking defendant's probation because the conclusion that defendant received a written copy of the probation conditions, as re-

quired by subsections (a) and (e) of this section, was not clearly against the preponderance of evidence; defendant's probation officer testified that the officer explained the conditions of probation to defendant and that defendant signed a copy of the conditions. *Lambert v. State*, 2013 Ark. App. 64, — S.W.3d — (2013).

**5-4-304. Confinement as condition of suspension or probation.**

(a) If a court suspends the imposition of sentence on a defendant or places him or her on probation, the court may require as an additional condition of its order that the defendant serve a period of confinement in the county jail, city jail, or other authorized local detention, correctional, or rehabilitative facility at any time or consecutive or nonconsecutive intervals within the period of suspension or probation as the court shall direct.

(b) An order that the defendant serve a period of confinement as a condition of suspension or probation is not deemed a sentence to a term of imprisonment, and a court does not need to enter a judgment of conviction before imposing a period of confinement as a condition of suspension or probation.

(c)(1)(A) The period actually spent in confinement pursuant to this section in a county jail, city jail, or other authorized local detention, correctional, or rehabilitative facility shall not exceed:

- (i) One hundred twenty (120) days in the case of a felony; or
- (ii) Thirty (30) days in the case of a misdemeanor.

(B) In the case of confinement to a facility in the Department of Community Correction, the period actually spent in confinement under this section shall not exceed three hundred sixty-five (365) days.

(2) For purposes of this subsection, any part of a twenty-four-hour period spent in confinement constitutes a day of confinement.

**History.** Acts 1975, No. 280, § 1204; A.S.A. 1947, § 41-1204; Acts 1993, No. 532, § 6; 1993, No. 550, § 6; 1999, No. 1569, § 3; 2003, No. 1742, § 1; 2005, No. 1443, § 1; 2011, No. 570, § 8.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement compre-

hensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

**Amendments.** The 2011 amendment substituted "detention" for "detentional" in (a) and (c)(1)(A); and, deleted former (c) and (e) and redesignated the remaining subsections accordingly.

**RESEARCH REFERENCES**

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2005 Arkansas General As-

sembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

## CASE NOTES

## ANALYSIS

**Illegal Sentence.**

Imprisonment and Probation or Suspension.

**Illegal Sentence.**

Defendant's sentence was illegal where the version of this section effective when defendant committed the crime limited time served as a condition of probation to one hundred twenty days in confinement; the trial court erred in amending defendant's probation to include a year in a Regional Punishment Facility. *Scissom v. State*, 367 Ark. 368, 240 S.W.3d 100 (2006).

Upon revoking defendant's probation for the fraudulent use of a credit or debit card, the trial court sentenced defendant to 365 days' incarceration in accordance with subdivision (d)(1)(B) of this section

and required her to attend a drug program. Because such a condition to incarceration was not authorized by § 5-4-104(d), the sentence was illegal. *Runion v. State*, 2012 Ark. App. 365, — S.W.3d — (2012).

**Imprisonment and Probation or Suspension.**

Trial court erred in imposing additional confinement as a condition of defendant's probation because subsection (d) of this section, which was in effect when the underlying offense was committed, did not allow additional time if a period of confinement had been included in the original order. *Scissom v. State*, 94 Ark. App. 452, 232 S.W.3d 502 (2006), *aff'd* in part, reversed in part, 367 Ark. 368, 240 S.W.3d 100 (2006).

**Cited:** *Richie v. State*, 2009 Ark. 602, 357 S.W.3d 909 (2009).

**5-4-306. Time period generally.**

If a court suspends imposition of sentence on a defendant or places him or her on probation, the period of suspension or probation shall be for a definite period of time not to exceed the maximum jail or prison sentence allowable for the offense charged.

**History.** Acts 1975, No. 280, § 1205; 1977, No. 772, § 1; A.S.A. 1947, § 41-1205; Acts 1999, No. 1569, § 4; 2011, No. 570, § 9.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement compre-

hensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

**Amendments.** The 2011 amendment deleted "Modification" from the end of the section heading; and deleted (a)(2) and (b).

**5-4-307. Time period — Calculation.**

## CASE NOTES

**Commencement of Sentence.**

Trial court did not lack jurisdiction to revoke defendant's suspended sentence on the ground that defendant failed to complete the Arkansas Reduction of Sexual Victimization Program (RSVP) as the conduct did not occur prior to the suspended sentence; the judgment and commitment order imposed a six-year term of impris-

onment to be served concurrently with the 10-year suspended sentence, as required by subdivision (b)(2) of this section. *Seamster v. State*, 2009 Ark. 258, 308 S.W.3d 567 (2009), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 425 (June 18, 2009).

**Cited:** *Donovan v. State*, 95 Ark. App. 378, 237 S.W.3d 484 (2006).



**5-4-308. [Repealed.]**

**Publisher's Notes.** This section, concerning transfer of jurisdiction, was repealed by Acts 2011, No. 570, § 10. The

section was derived from Acts 1975, No. 280, § 1207; A.S.A. 1947, § 41-1207.

**5-4-309. [Repealed.]**

**Publisher's Notes.** This section, concerning violation of conditions — arrest, revocation and sentencing, was repealed by Acts 2011, No. 570, § 11. The section

was derived from Acts 1975, No. 280, § 1208; A.S.A. 1947, § 41-1208; Acts 1999, No. 847, § 1; 2003, No. 841, § 1; 2005, No. 1534, § 1; 2009, No. 633, § 3.

**CASE NOTES****ANALYSIS**

Cause for Revocation.  
Preponderance of the Evidence  
Restitution or Reparation.

**Cause for Revocation.**

Because defendant's conviction for possession of cocaine with intent to deliver violated a condition of defendant's probation, a trial court did not err under subsection (d) of this section in revoking defendant's probation. *Dishman v. State*, 2011 Ark. App. 437, 384 S.W.3d 590 (2011).

Because a probationer conceded that the probationer did not contact the probation office in Arkansas to inquire about the probationer's obligations while the probationer was on parole in Louisiana and that the probationer had made no payments toward the probationer's fines, costs, and restitution since the probationer was placed on probation, pursuant to this section, probation was properly revoked. *Bass v. State*, 2011 Ark. App. 455, — S.W.3d — (2011).

Revocation of appellant's probation was affirmed because appellant's probation officer testified that appellant had stopped reporting and that he had tested positive for cocaine use. *McPherson v. State*, 2012 Ark. App. 50, — S.W.3d — (2012).

Trial court did not err under subsection (d) of this section in revoking defendant's probation for failure to register as a sex offender because defendant had not made any payments towards defendant's court costs and fees or indigent-defender fee; defendant had the ability to pay the fines and costs, as defendant had a job and had recently bought a vehicle, yet he had made

no payments at all. *Williams v. State*, 2012 Ark. App. 298, — S.W.3d — (2012).

Trial court did not err under subsection (d) of this section in revoking defendant's probation for delivery of Xanax because the evidence showed that defendant violated the conditions of probation by failing to appear for a drug test and testing positive twice for methamphetamine; defendant was also discharged from a treatment center and a drug-court program. *Johnson v. State*, 2012 Ark. App. 300, — S.W.3d — (2012).

Appellant's probation was properly revoked under subsection (d) of this section because any error in admitting a challenged statement was rendered harmless by the testimony of the declarant, and even if appellant had an excuse for the first time he failed to report to his probation officer, his subsequent failures to report were inexcusable violations of the terms and conditions of his probation. Thus, the appeal lacked merit, and counsel's motion to withdraw was granted under Ark. Sup. Ct. & Ct. App. R. 4-3(k)(1). *James v. State*, 2012 Ark. App. 429, — S.W.3d — (2012).

Court's revocation of probation was not clearly against the preponderance of the evidence, because the probation officer testified that the petitioner had missed ten reports, and the petitioner admitted as much during his testimony. *Hampton v. State*, 2012 Ark. App. 450, — S.W.3d — (2012).

Trial court did not err in revoking defendant's suspended sentences under subsection (d) of this section in cases where he pled guilty to forgery and theft by receiving, because the state proved by a preponderance of the evidence that he

committed a new offense of theft by receiving. The complainant testified defendant took his car for a test drive and did not return it; the officer dispatched to the vehicle-theft report testified defendant handed him the key to the car; and defendant's testimony that he took the car to a mechanic to have the transmission repaired made no sense. *Wallace v. State*, 2012 Ark. App. 571, — S.W.3d — (2012).

Evidence was sufficient to sustain the revocation of defendant's suspended sentence because the victim saw where defendant had broken into his shop, noticed that tools and equipment had been gathered, discovered defendant hiding inside the shop, and the victim identified defendant in a photographic lineup. *Upshaw v. State*, 2013 Ark. App. 41, — S.W.3d — (2013).

Evidence was sufficient to sustain the revocation of defendant's suspended sentence because the victim saw where defendant had broken into his shop, noticed that tools and equipment had been gathered, discovered defendant hiding inside the shop, and the victim identified defendant in a photographic lineup. *Upshaw v. State*, 2013 Ark. App. 41, — S.W.3d — (2013).

Court affirmed the revocation of appellant's suspended sentence under subsection (d) of this section because appellant failed to take the stand and assert any reason why he did not make his restitution payments, including an inability to pay. Because appellant did not offer any reason as to why he had failed to make his restitution payments, he did not sustain his burden of proving a reasonable excuse for nonpayment. *Pevetoe v. State*, 2013 Ark. App. 161, — S.W.3d — (2013).

## 5-4-310. [Repealed.]

**Publisher's Notes.** This section, concerning revocation hearings, was repealed by Acts 2011, No. 570, § 12. The section

## 5-4-311. [Repealed.]

**Publisher's Notes.** This section, concerning discharge and dismissal, was repealed by Acts 2011, No. 570, § 13. The section was derived from Acts 1975, No.

## Preponderance of the Evidence

Revocation of probation was proper, because the State need only prove that defendant committed one violation of the conditions, and the finding that defendant inexcusably failed to make payments as ordered was not clearly against the preponderance of the evidence; the probation officer testified that defendant was delinquent on his probation fees, and defendant did not offer any testimony or other evidence. *Graydon v. State*, 2012 Ark. App. 587, — S.W.3d —, 2012 Ark. App. LEXIS 716 (Oct. 24, 2012).

## Restitution or Reparation.

Trial court did not err in continuing defendant's probation for failure to pay restitution as ordered, despite defendant's argument that she was looking for work, that she was seeking to have her theft conviction overturned, and that she was trying to get disability, all of which claims were seriously undermined by the state. *Newsom v. State*, 2011 Ark. App. 760, 387 S.W.3d 245 (2011), rehearing denied, — S.W.3d —, 2012 Ark. App. LEXIS 75 (Ark. Ct. App. Jan. 4, 2012).

In a criminal contempt case under § 16-10-108(a)(3), substantial evidence supported the trial court's determination that defendant willfully violated the court's orders requiring her to make restitution payments because defendant testified that she received a monthly disability check in the amount of \$633 but did not use the money to make restitution payments. Subsection (d) of this section did not apply, because the trial court did not revoke defendant's suspended sentence. *Summers v. State*, 2012 Ark. App. 247, — S.W.3d — (2012).

**Cited:** *Joiner v. State*, 2012 Ark. App. 380, — S.W.3d — (2012).

was derived from Acts 1975, No. 280, § 1209; A.S.A. 1947, § 41-1209.

280, § 1210; 1977, No. 474, § 10; A.S.A. 1947, § 41-1210; Acts 1995, No. 998, § 1; 1999, No. 1407, § 2.



**5-4-312. Presentence investigation — Placement in a community correction program.**

(a)(1) A court may require that either a presentence investigation be conducted by either the probation officer or presentence investigation officer assigned to the court or that the defense counsel of a defendant, the prosecuting attorney, a probation officer, and other persons whom the court believes have information relevant to the sentencing of the defendant submit to the court the information in writing prior to sentencing.

(2) The presentence investigation or information submitted by the persons described in subdivision (a)(1) of this section shall be forwarded with the commitment order to the circuit clerk and retained in the defendant's case file.

(b) Upon determination by a court that a defendant is an eligible offender and that placement in a community correction program under § 16-93-1201 et seq. is proper, the court may:

(1)(A) Suspend the imposition of the sentence or place the defendant on probation, under §§ 5-4-104, 5-4-201 et seq., 5-4-301 — 5-4-307, and 16-93-314.

(B) A sentence under subdivision (b)(1)(A) of this section may be accompanied by assignment to a community correction program under § 16-93-1201 et seq. for a designated period of time commensurate with the goals of the community correction program assignment and the rules established by the Board of Corrections for the operation of community correction programs.

(C) The court shall maintain jurisdiction over the defendant sentenced under subdivision (b)(1)(A) of this section with supervision outside the confines of the specific programming provided by probation officers assigned to the court.

(D)(i) If a person sentenced under subdivision (b)(1)(A) of this section violates any term or condition of his or her sentence or term of probation, revocation of the sentence or term of probation shall be consistent with the procedures established by law for the revocation of suspended imposition of sentence or probation.

(ii) Upon revocation as described in subdivision (b)(1)(D)(i) of this section, the court shall determine whether the defendant shall remain under the jurisdiction of the court and be assigned to a more restrictive community correction program, facility, or institution for a period of time or committed to the Department of Correction.

(iii) If the defendant is committed to the Department of Correction under subdivision (b)(1)(D)(ii) of this section, the court shall specify if the commitment is for judicial transfer of the offender to the Department of Community Correction or is a commitment to the Department of Correction; or

(2)(A) Commit the defendant to the custody of the Department of Correction for judicial transfer to the Department of Community Correction subject to the following:

(i) That the sentence imposed provides that the defendant shall not serve more than two (2) years of confinement, with credit for meritorious good time, with initial placement in a Department of Community Correction facility; and

(ii) That the initial placement in the Department of Community Correction facility is conditioned upon the defendant's continuing eligibility for Department of Community Correction placement and the defendant's compliance with all applicable rules established by the board for community correction programs.

(B) Post-prison supervision of the defendant shall accompany and follow the community correction program when appropriate.

(c) A defendant may not be excluded from placement in a community correction program under this section based solely on the defendant's inability to speak, read, write, hear, or understand English.

**History.** Acts 2011, No. 570, § 14.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement compre-

hensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

### **5-4-313. Placement in a drug treatment program — Drug court alternative.**

If a judicial district has one (1) or more of the following programs in place at the time of a defendant's sentencing for a felony, a court may sentence the defendant to:

(1) A posttrial treatment program for drug abuse under § 16-98-201; or

(2) Drug court under the Arkansas Drug Court Act, § 16-98-301 et seq.

**History.** Acts 2011, No. 570, § 14.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement compre-

hensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

### **5-4-323. Additional conditions — High school diploma or general education development certificate — Employment training.**

(a)(1) As an additional requirement for suspension of sentence or probation, a court may require any person who is sentenced for a felony or a Class A misdemeanor to make a good faith effort toward completion of a high school diploma or a general education development certificate unless the person has already achieved a high school diploma or a general education development certificate.

(2) The additional requirement under subdivision (a)(1) of this section shall be implemented only:

(A) After the appropriate school or adult education program has received notice from the court at least ten (10) working days prior to the person's making application to enroll so as to allow a school or



adult education program official to review the person's educational records; and

(B) Upon the acceptance of the person by the administrative head of the school or adult education program.

(3) If no appropriate school or adult education program can be found, the additional requirement under subdivision (a)(1) of this section is of no effect.

(4) In the alternative, the court may allow the defendant to pursue a prescribed course of study or vocational training approved by the court that is designed to equip him or her for suitable employment.

(5)(A) After consultation with the school or the adult education program, the court shall determine the appropriate documentation for a person participating under a provision of this section and shall report any documentation of school or adult education program participation on a quarterly basis to the Administrative Office of the Courts.

(B) The office shall then report to the Department of Career Education.

(b)(1) Unless the person is employed or has a skill that will facilitate immediate employment, the court may require any person sentenced for a felony or a Class A misdemeanor to make a good faith effort toward obtaining gainful employment by participating in an appropriate employment training program as an additional requirement for suspension of sentence or probation.

(2)(A) The additional requirement under subdivision (b)(1) of this section shall be implemented by the person's reporting to the local workforce center for registration, intake, and employability skills assessment.

(B) If the person is on probation, the additional requirement under subdivision (b)(1) of this section shall be accomplished in conjunction with the probation officer.

(C) In addition to the employability skills assessment, the person shall register for employment with the local workforce center and upon obtaining employment shall communicate the event to the:

(i) Court if on suspension of sentence; or

(ii) Probation officer if on probation.

(c) As used in this section, "good faith effort" means a person:

(1) Has been enrolled in a program of instruction leading to a high school diploma or a general education development certificate and is attending a school or an adult education course; or

(2) Is registered for employment and enrolled and participating in an employment-training program with the purpose of obtaining gainful employment.

(d) A person who fails to make a good faith effort to comply with a court order issued under this section upon conviction is guilty of a violation and shall be punished by a fine of at least one hundred dollars (\$100) but not more than one thousand dollars (\$1,000).

**History.** Acts 1991, No. 857, § 1; 1993, No. 343, § 1; 1993, No. 1267, § 1; 1994 (2nd Ex. Sess.), No. 30, § 4; 1994 (2nd Ex. Sess.), No. 31, § 4; 1999, No. 1323, § 2; 2003, No. 1006, § 1; 2007, No. 827, § 14; 2011, No. 570, §§ 15–17.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “Legislative intent. The intent of this act is to implement compre-

hensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs.”

**Amendments.** The 2011 amendment deleted former (c) and redesignated the remaining subsections accordingly; substituted “As used in this section, ‘Good faith effort’” for “‘A good faith effort’” in the introductory paragraph of (c).

## SUBCHAPTER 4 — IMPRISONMENT

### SECTION.

5-4-402. Place of imprisonment.

### 5-4-401. Sentence.

## CASE NOTES

### ANALYSIS

In General.

Construction.

Attempted Capital Murder.

Due Process.

Juveniles.

Modification of Sentence.

Postconviction Proceedings.

Prejudice.

Propriety of Sentence.

Stacking.

Suspension or Probation.

Unauthorized Sentence.

Writ of Habeas Corpus Denied.

### In General.

Granting of the inmate’s petition for postconviction relief was inappropriate because the circuit court failed to make the required finding under Strickland’s prejudice prong since a defendant who received a sentence less than the maximum sentence for the offense could not show prejudice from the sentence itself. The maximum sentence that the inmate could have received for the offense of first-degree battery was 20 years and a \$15,000 fine; she received 180 months in prison and a fine of \$7,500. *State v. Smith*, 368 Ark. 620, 249 S.W.3d 119 (2007).

### Construction.

While it is true that a term of zero years in prison or a fine of zero dollars are, strictly speaking, no imprisonment and no fine, the terms “up to” and “not exceeding,” as used in Ark. Code Ann. § 5-4-

401(a)(5), includes zero when no lower limit is set. Because courts strictly construe criminal statutes and resolve any doubt in favor of the defendant, it only follows that a sentencing range which allows for a term of imprisonment “up to” a set number of years or a fine “not exceeding” a set amount includes zero. *Donaldson v. State*, 370 Ark. 3, 257 S.W.3d 74 (2007).

### Attempted Capital Murder.

During a trial for attempted first-degree murder, defendant was not entitled to a mistrial based on the prosecutor’s questions to a witness during the sentencing phase of the trial about blood stains on the bridge; defendant failed to request a cautionary instruction. He could not show prejudice, because his twenty-eight-year sentence was within the statutory range set forth in subdivision (a)(2) of this section for a Class A felony and less than the maximum sentence within the statutory range. *Jones v. State*, 2009 Ark. App. 135, — S.W.3d — (2009).

### Due Process.

Because defendant was unable to show that he was prejudiced by his 40 year sentence for first-degree murder, as it was less than the maximum possible sentence for his conviction, the court did not consider his claim that his due process rights were violated by the admission of a photographic history of the victim’s life during sentencing. *Tate v. State*, 367 Ark. 576, 242 S.W.3d 254 (2006).



**Juveniles.**

Juvenile's capital-murder sentence of life without parole under § 5-10-101(c) was unconstitutional; the case was remanded for resentencing under the discretionary range for a Class Y felony, under subdivision (a)(1) of this section, after a sentencing hearing at which the juvenile could present mitigating evidence to a jury. *Whiteside v. State*, 2013 Ark. 176, — S.W.3d — (2013).

**Modification of Sentence.**

Although defendant's Class C felony conviction for theft by receiving in excess of \$500.00 could not stand, defendant did not challenge the sufficiency of the evidence showing that he was generally guilty of theft by receiving and, as the value of the stolen generator was at most \$499.99, defendant still stood convicted of a Class A misdemeanor; accordingly, his conviction was modified to reflect the maximum sentence for a Class A misdemeanor of one year, with credit for any time defendant had already served. *Russell v. State*, 367 Ark. 557, 242 S.W.3d 265 (2006).

Upon the revocation of defendant's probation for eight violations of the Arkansas Hot Check Law, the trial court was authorized under §§ 5-4-301(d)(2) and 5-4-309(f)(1)(A) to modify the original order and impose multiple sentences of imprisonment to be served consecutively in accordance with Ark. Code Ann. § 5-4-403(a). The trial court did not err by sentencing defendant to twenty years in prison each on four hot-check counts to run consecutively and ten years in prison each on the other felony hot-check counts to run concurrently; the sentences were within the parameters authorized for multiple felony convictions under this section. *Maldonado v. State*, 2009 Ark. 432, — S.W.3d — (2009).

**Postconviction Proceedings.**

Where appellant entered negotiated pleas of guilty to kidnapping under § 5-11-102 and additional charges, he was sentenced to 120 months' in prison with an additional 120-month suspended sentence; appellant was not entitled to postconviction relief under Ark. R. Crim. P. 37.1, because he could not prove that counsel failed to advise him of a possible life sentence under this section. On the

record, counsel indicated that he had advised appellant that he could be subject to a life sentence if he violated the terms of the suspended sentence. *French v. State*, 2009 Ark. 443, — S.W.3d — (2009).

Trial court properly denied defendant's motion for postconviction relief because the evidence showed that defendant's guilty pleas were made on the advice of competent counsel; had defendant not pled guilty, defendant potentially faced up to life in prison for each rape offense and up to 10 years in prison for a failure-to-appear offense, pursuant to subdivisions (a)(1) and (4) of this section. *Henson v. State*, 2011 Ark. 375, — S.W.3d — (2011).

**Prejudice.**

Defendant failed to show prejudice resulting from the admissibility of his juvenile criminal record at sentencing because defendant could have been sentenced to a total of 30 years, but was sentenced to 12 years' imprisonment, followed by 18 years' suspended imposition of sentence; therefore, defendant received a sentence short of the maximum sentence and was not prejudiced from the sentence itself. *Johnson v. State*, 2010 Ark. App. 606, 378 S.W.3d 152 (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 486 (Oct. 21, 2010).

**Propriety of Sentence.**

Subdivision (a)(1) of this section authorized a sentence of ten to forty years or life in prison for a Class Y felony, which rape was considered to be, and § 5-4-403(a) allowed a court to impose consecutive sentences for multiple convictions; thus, defendant's sentence was not unduly harsh. *Simmons v. State*, 95 Ark. App. 114, 234 S.W.3d 321 (2006).

Trial court's decision to permit the introduction of evidence relating to defendant's criminal history during the sentencing phase of his trial was consistent with the mandates of § 16-97-103; at sentencing, under subdivision (a)(1) of this section, defendant was subjected to the normal ranges of Class A and Y felonies as opposed to the enhanced ranges designated for habitual offenders. Defendant actually received the minimum sentences allowed on two of his four convictions and less than the maximum on the other two and, under § 5-4-403, his sentences were ordered to run concurrently rather than

consecutively, as they could have; thus, defendant not only failed to establish a threshold evidentiary error supporting reversal, but he also failed to show that he suffered prejudice during sentencing. *Wilson v. State*, 100 Ark. App. 14, 262 S.W.3d 628 (2007).

Trial judge did not err in denying defendant's motion to recuse on the ground that the judge knew his fiancée's parents because defendant failed to show bias; defendant's 20-year sentences for two counts of possession of methamphetamine with intent to deliver did not include a possession of drug paraphernalia conviction for which defendant could have received up to 20 years in prison under subdivision (3) of this section and § 5-64-403(c)(5)(A). *Rudd v. State*, 2010 Ark. App. 784, — S.W.3d — (2010).

In a case where probation was revoked, a 20-year sentence for Class B felony kidnapping was not improper since it was authorized under subdivision (a)(3) of this section; the appellate court was unable to reduce a sentence within the range of punishment contemplated by the Arkansas Legislature. Moreover, since appellant failed to object to the sentence imposed, he was unable to argue on appeal that the trial court erred by failing to consider alternatives to the 20-year sentence. *Pfeiffer v. State*, 2012 Ark. App. 556, — S.W.3d — (2012).

Inmate's appeal of the denial of the inmate's petition to correct an illegal sentence, pursuant to § 16-90-111, was dismissed because (1) Ark. R. Crim. P. 37.2(b) said all postconviction relief grounds cognizable under Ark. R. Crim. P. 37.1 had to be raised in a Rule 37.1 petition filed within 90 days of the date of judgment when a defendant pled guilty, even though § 16-90-111 let a trial court correct an illegal sentence at any time, as the statute was superseded to the extent the statute conflicted with the Rule's time limits, (2) the petition was filed over six years after judgment was entered, (3) the time limits in Ark. R. Crim. P. 37.2 were jurisdictional, denying a trial court jurisdiction if the time limits were not met, and, on appeal, a reviewing court, and (4) the inmate's sentence was within the prescribed statutory ranges in § 5-4-501(b)(2)(A) and subdivision (b)(1) of this section. *Redus v. State*, 2013 Ark. 9, —

S.W.3d —, 2013 Ark. LEXIS 15 (Jan. 17, 2013).

Circuit court erred by denying appellant juvenile's petition for writ of habeas corpus; because he was only fourteen years old when he committed capital-murder and aggravated-robbery, his mandatory sentence of life imprisonment without parole violated the Eighth Amendment, U.S. Const. amend. VIII. In considering the capital-murder statute as it pertained to juveniles, the Supreme Court of Arkansas severed portions of § 5-10-101(c) which provided that capital murder was punishable by death or life imprisonment without parole; instead, the offense was subject to a punishment range for a Class Y felony under subdivision (a)(1) of this section of not less than ten years and not more than forty years, or life. *Jackson v. Norris*, 2013 Ark. 175, — S.W.3d — (2013).

### **Stacking.**

*State v. Lawson*, 295 Ark. 37, 746 S.W.2d 544, 1988 Ark. LEXIS 84 (1988), prohibits "stacking" of specific subsequent-offense penalty enhancements like the one in the driving while impaired statute, which operates to convert a misdemeanor to a felony because of multiple recurrences of the same underlying offense within a specified period of time; the Court of Appeals of Arkansas, Division One, declines to expand *Lawson* past that boundary. Therefore, there was no impermissible stacking of a specific firearm enhancement statute for a felon in possession of a firearm under § 5-73-103(c)(1) with the general habitual-offender enhancement statute under subdivision (b)(2)(C) of this section; § 5-73-103(c)(1) did not contain an enhancement for recidivism, there was no greater sentence than if either statute was applied singly, and the designation of the possession offense as a Class B felony was not an enhancement. *Moore v. State*, 2012 Ark. App. 662, — S.W.3d —, 2012 Ark. App. LEXIS 764 (Nov. 14, 2012).

### **Suspension or Probation.**

Trial court erred in imposing a 10-year sentence for defendant's terroristic threatening conviction after his probation was revoked because the terroristic threatening conviction was a Class D felony and was punishable by a maximum



sentence of six years' imprisonment. *Turner v. State*, 88 Ark. App. 40, 194 S.W.3d 225 (2004), overruled in part, *Bush v. State*, 90 Ark. App. 373, 206 S.W.3d 268 (2005).

Where appellant had been sentenced to five years' probation and fined for first-degree sexual abuse, a trial court properly sentenced him to 10 years in prison upon revocation of probation under § 5-4-309(f) because appellant could have originally received that term under §§ 5-14-108, 5-4-401(a)(4) and there had been no sentence imposed that had been improperly modified under §§ 5-4-301(d) (1997), or 16-93-402(e). *Rickenbacker v. Norris*, 361 Ark. 291, 206 S.W.3d 220 (2005).

Circuit court did not err in revoking defendant's suspended sentence and probation and in sentencing him to 197 months imprisonment with forty-seven months suspended because the circuit court was within its authority to revoke the original sentences and prescribe the resulting sentence and was also within its authority to run the prescribed sentences consecutively when the prescribed sentence in the first case, thirty months with an additional forty-seven months' suspended, was within the circuit court's authority; because defendant was convicted of a Class C felony, the circuit court could have originally sentenced him to ten years' imprisonment for failure to appear pursuant to subdivision (a)(4) of this section, the sentence imposed as a result of revocation in the second case did not exceed the statutory maximum for the underlying offense and was not illegal on its face, and a notation on the judgment and disposition order in the second case was an insufficient basis for defendant's allegation that the circuit court unambiguously intended to impose a presumptive sentence of thirty-six months in the event he failed to comply with the conditions of his probation. *Ward v. State*, 2010 Ark. App. 79, 374 S.W.3d 62 (2010).

Trial court did not err in sentencing defendant after revoking his probation because defendant pleaded guilty to second-degree domestic battery, § 5-26-304, and third-degree domestic battery, § 5-26-305, and his sentences of ten and six years, respectively, were sentences that could have been originally imposed for the offenses of which he was found guilty.

*Jones v. State*, 2012 Ark. App. 69, 388 S.W.3d 503 (2012).

### **Unauthorized Sentence.**

Trial court imposed an illegal sentence when it rejected a jury's verdict and took it upon itself to sentence defendant where the jury's sentencing verdict of zero years in prison and a fine of zero dollars was a proper and valid sentence for second-degree battery under Ark. Code Ann. § 5-4-401(a)(5). *Donaldson v. State*, 370 Ark. 3, 257 S.W.3d 74 (2007).

Upon defendant's conviction for rape and second-degree battery, the circuit court erred in ordering him to complete a sex-offender treatment program because he was sentenced under this section and § 5-4-501—these statutes did not authorize the court to order a sex-offender treatment program. *White v. State*, 2012 Ark. 221, — S.W.3d — (2012).

Court entered an illegal sentence by sentencing the petitioner to seventy-two-months' imprisonment on a misdemeanor, because if property damage occurred as a direct result of fleeing on foot, the offense was a Class A misdemeanor, and a sentence for a Class A misdemeanor should not exceed one year. *Arter v. State*, 2012 Ark. App. 327, — S.W.3d — (2012).

Because the sentence of 20 years' imprisonment with a 10-year suspended imposition of sentence, while falling within the statutory-sentencing range for Class A arson under § 5-38-301(b)(5) and subdivision (a)(2) of this section, exceeded the range for Class B residential burglary and Class C theft of property, under §§ 5-39-201(a)(2), 5-36-103(b)(2), and subdivisions (a)(3) and (4) of this section, the residential-burglary and theft-of-property sentences were illegal, and the case was remanded for resentencing. *Wakeley v. State*, 2013 Ark. App. 231, — S.W.3d — (2013).

### **Writ of Habeas Corpus Denied.**

Denial of writ of habeas corpus was affirmed because the inmate failed to state a cognizable claim when he did not dispute that the sentences were within the range set in this section, and he was well informed as to the nature of the charges and the range of punishment those charges carried pursuant to his negotiated guilty pleas. *Anderson v. Norris*, 370 Ark. 110, 257 S.W.3d 540 (2007).

Denial of writ of habeas corpus was proper, because life imprisonment for aggravated robbery was within the statutory range, irrespective of any enhancement as a habitual offender, and a sentence that was within the prescribed range was not illegal. *Goins v. Norris*, 2012 Ark. 192, — S.W.3d — (2012).

**Cited:** *Jester v. State*, 367 Ark. 249, 239 S.W.3d 484 (2006); *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007); *Ward v. State*, 2010 Ark. App. 79, 374 S.W.3d 62 (2010); *Reed v. State*, 2011 Ark. 115, — S.W.3d — (2011).

#### **5-4-402. Place of imprisonment.**

(a) Except as provided in §§ 5-4-304 and 16-93-708, a defendant convicted of a felony and sentenced to imprisonment shall be committed to the custody of the Department of Correction for the term of his or her sentence or until released in accordance with law.

(b) Except as provided in § 16-93-708, a defendant convicted of a misdemeanor and sentenced to imprisonment shall be committed to the county jail or other authorized institution designated by the court for the term of his or her sentence or until released in accordance with law.

(c) Except as provided in § 5-4-304 or § 16-93-708, a defendant convicted of a felony violation of §§ 5-64-419 — 5-64-442 and sentenced to imprisonment shall be committed to the custody of the Department of Correction for the term of his or her sentence or until released in accordance with law.

(d)(1)(A) A juvenile sentenced in circuit court who is less than sixteen (16) years of age when sentenced shall be committed to the custody of the Division of Youth Services of the Department of Human Services until his or her sixteenth birthday, at which time he or she shall be transferred to the Department of Correction, except as provided by court order or parole decision made by the Parole Board.

(B) Any record from the division shall be transferred to the Department of Correction at the time the juvenile is transferred.

(2) A juvenile less than sixteen (16) years of age who is awaiting transfer to the Department of Correction shall be segregated from the general delinquency population housed at the division.

(e)(1) With the consent and approval of the division, the Department of Correction may transfer from the Department of Correction to the division any inmate less than eighteen (18) years of age who, in the opinion of the Department of Correction and the division, is more suited and adaptable by age, physical size, and temperament to a program of the Department of Human Services.

(2)(A) An inmate transferred to the division shall be segregated from the general delinquency population housed at the division.

(B) If an inmate violates a rule of the division's program or facility or is otherwise not amenable to the division's rehabilitative effort, the division may return the inmate to the Department of Correction.

(3) Any inmate transferred to the division under this subsection shall be returned to the Department of Correction on the inmate's eighteenth birthday.



**History.** Acts 1975, No. 280, § 902; 1985, No. 982, § 1; A.S.A. 1947, § 41-902; Acts 1999, No. 1192, § 11; 2001, No. 559, § 9; 2005, No. 680, § 2; 2011, No. 570, § 18; 2011, No. 1120, § 4.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and

contain correction costs."

**Amendments.** The 2011 amendment by No. 570, in (c), inserted "§ 5-4-304 or" and "felony," and substituted "§ 5-64-419 — § 5-64-442 and sentenced to imprisonment" for "§ 5-64-401."

The 2011 amendment by No. 1120 deleted "5-4-203" preceding "§ 5-4-304" in (a).

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2005 Arkansas General As-

sembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

## CASE NOTES

### Jurisdiction.

Circuit court lacked jurisdiction to consider the appeal, because the petitioner's allegation, in reality, was a challenge to the calculation of his parole eligibility and the Arkansas Department of Correction's application of a parole-eligibility statute to his sentence, and the judiciary had no jurisdiction over how parole eligibility was

determined or the conditions to be placed on it once the sentence was placed into execution. *Johnson v. State*, 2012 Ark. 212, — S.W.3d — (2012), rehearing denied, — S.W.3d —, 2012 Ark. LEXIS 308 (Ark. June 21, 2012), rehearing denied, — S.W.3d —, 2012 Ark. LEXIS 310 (Ark. June 22, 2012).

## 5-4-403. Multiple sentences — Concurrent and consecutive terms.

## RESEARCH REFERENCES

**ALR.** Construction and Application of U.S.S.G. § 5G1.3(b), Requiring Federal Sentence to Run Concurrently to Undischarged State Sentence When State Sentence Has Been Fully Taken into Account

in Determining Offense Level for Federal Offense — Particular Events Preceding Federal Sentence and Sentencing Credit. 32 A.L.R. Fed. 2d 178.

## CASE NOTES

### ANALYSIS

Consecutive Sentences.  
Determination of Sentence.  
Discretion of Court.  
Error.

### Consecutive Sentences.

Section 5-4-401(a)(1) authorized a sentence of ten to forty years or life in prison for a Class Y felony, which rape was considered to be, and this section allowed a court to impose consecutive sentences for multiple convictions; thus, defendant's sentence was not unduly harsh. *Simmons*

*v. State*, 95 Ark. App. 114, 234 S.W.3d 321 (2006).

Consecutive sentences under subsection (a) of this section were improper in a case where a trial judge relied upon the record of codefendants and rejected a jury's recommendation of nonconsecutive sentences; the trial court was not allowed to take judicial notice of the court records, as they were not introduced into evidence. *Throneberry v. State*, 102 Ark. App. 17, 279 S.W.3d 489 (2008), review denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 563 (Sept. 4, 2008), superseded, 2009 Ark. 507, 342 S.W.3d 269 (2009).

Upon the revocation of defendant's probation for eight violations of the Arkansas Hot Check Law, the trial court was authorized under §§ 5-4-301(d)(2) and 5-4-309(f)(1)(A) to modify the original order and impose multiple sentences of imprisonment to be served consecutively in accordance with subsection (a) of this section. The trial court did not err by sentencing defendant to twenty years in prison each on four hot-check counts to run consecutively and ten years in prison each on the other felony hot-check counts to run concurrently. *Maldonado v. State*, 2009 Ark. 432, — S.W.3d — (2009).

Pursuant to subsection (a) of this section, the circuit court did not abuse its discretion in ordering defendant's sentences to run consecutively where the trial court expressly stated that it was relying on the testimony presented in defendant's case and was not considering the evidence from the other two trials. *Throneberry v. State*, 2009 Ark. 507, 342 S.W.3d 269 (2009).

#### **Determination of Sentence.**

Trial court did not err in sentencing defendant after revoking his probation because defendant pleaded guilty to second-degree domestic battery, § 5-26-304, and third-degree domestic battery, § 5-26-305, and his sentences of ten and six years, respectively, were sentences that could have been originally imposed for the offenses of which he was found guilty. *Jones v. State*, 2012 Ark. App. 69, 388 S.W.3d 503 (2012).

Trial court could have reasonably concluded that defendant's commission of five new felonies warranted consecutive sentences, given that the sentences defendant had received on defendant's previous 12 felonies had apparently not served to deter defendant's criminal conduct. *Turner v. State*, 2012 Ark. App. 150, 391 S.W.3d 358 (2012).

#### **Discretion of Court.**

Imposition of consecutive sentences was not in violation of defendant's due process rights or the Eighth Amendment to the U.S. Constitution where the trial judge noted that the sentences imposed on each count were less than the maximum and that the approach was consistent with other jury sentences in the country; the

trial judge clearly exercised discretion in accepting the jury's recommendation. *Ford v. State*, 99 Ark. App. 119, 257 S.W.3d 560 (2007).

Trial court's decision to permit the introduction of evidence relating to defendant's criminal history during the sentencing phase of his trial was consistent with the mandates of § 16-97-103; at sentencing, under § 5-4-401(a)(1), defendant was subjected to the normal ranges of Class A and Y felonies as opposed to the enhanced ranges designated for habitual offenders. Defendant actually received the minimum sentences allowed on two of his four convictions and less than the maximum on the other two and, under this section, his sentences were ordered to run concurrently rather than consecutively, as they could have; thus, defendant not only failed to establish a threshold evidentiary error supporting reversal, but he also failed to show that he suffered prejudice during sentencing. *Wilson v. State*, 100 Ark. App. 14, 262 S.W.3d 628 (2007).

In making a decision between concurrent and consecutive sentences under this section, the trial court should make it clear that it was its discretion being exercised when entering the sentences and not the jury's; thus, the trial court did not err in not instructing the jury on concurrent and consecutive sentences. *Lee v. State*, 2013 Ark. App. 209, — S.W.3d — (2013).

#### **Error.**

Applicant was entitled to relief, because an error by the Arkansas Department of Correction (ADC) in failing to enter the Fourth Division conviction and sentence in the ADC system caused the failure to have the applicant complete his concurrent state sentences before being transferred to the United States Bureau of Prisons (BOP); the ADC must correct its record to show that the applicant began serving his Fourth Division sentence on the same date he began to serve his Second Division sentence, and upon transfer to the ADC from the BOP, the applicant must serve whatever remains of the sentence he would have served in the ADC had the ADC run his state sentences concurrently as required. *Kelley v. Norris*, 2012 Ark. 86, — S.W.3d — (2012).

**Cited:** *Gines v. State*, 2009 Ark. App. 628, — S.W.3d — (2009).



**5-4-404. Credit for time spent in custody.****RESEARCH REFERENCES**

**ALR.** Defendant's Right to Credit for Time Spent in Halfway House, Rehabilitation Center, or Similar Restrictive Envi-

ronment as Condition of Pretrial Release. 46 A.L.R.6th 63.

**CASE NOTES****ANALYSIS**

Entitlement to Credit.  
Guilty Pleas.

**Entitlement to Credit.**

Where appellant did not complete drug court, he was required to serve a six-year sentence for forgery and a ten-year suspended sentence for theft. Under § 5-4-404, he was entitled to 53 days credit for the time he spent in jail before he entered drug court; appellant was not entitled to

credit for the time that his case was in drug court. *Laxton v. State*, 99 Ark. App. 1, 256 S.W.3d 518 (2007).

**Guilty Pleas.**

Where appellant pleaded guilty to aggravated robbery, forgery, criminal mischief, and battery, Ark. R. App. P. Crim. 1 did not permit him to appeal the denial of jail-time credit under this section because it was an integral part of the acceptance of appellant's guilty plea. *Kennedy v. State*, 2013 Ark. App. 140, — S.W.3d — (2013).

**SUBCHAPTER 5 — EXTENDED TERM OF IMPRISONMENT****SECTION.**

5-4-501. Habitual offenders — Sentencing for felony.

**5-4-501. Habitual offenders — Sentencing for felony.**

(a)(1) A defendant meeting the following criteria may be sentenced to pay any fine authorized by law for the felony conviction and to an extended term of imprisonment as set forth in subdivision (a)(2) of this section:

(A) A defendant who:

(i) Is convicted of a felony other than those enumerated in subsections (c) and (d) of this section committed after June 30, 1993; and

(ii) Has previously been convicted of more than one (1) felony but fewer than four (4) felonies or who has been found guilty of more than one (1) but fewer than four (4) felonies;

(B) A defendant who:

(i) Is convicted of any felony enumerated in subsection (c) of this section committed after August 31, 1997; and

(ii) Has previously been convicted of more than one (1) felony but fewer than four (4) felonies not enumerated in subsection (c) of this section or who has been found guilty of more than one (1) but fewer than four (4) felonies not enumerated in subsection (c) of this section;

or

(C) A defendant who:

(i) Is convicted of any felony enumerated in subsection (d) of this section committed after August 31, 1997; and

(ii) Has previously been convicted of more than one (1) felony but fewer than four (4) felonies not enumerated in subsection (d) of this section or has been found guilty of more than one (1) but fewer than four (4) felonies not enumerated in subsection (d) of this section.

(2) The extended term of imprisonment for a defendant described in subdivision (a)(1) of this section is as follows:

(A) For a conviction of a Class Y felony, a term of imprisonment of not less than ten (10) years nor more than sixty (60) years, or life;

(B) For a conviction of a Class A felony, a term of imprisonment of not less than six (6) years nor more than fifty (50) years;

(C) For a conviction of a Class B felony, a term of imprisonment of not less than five (5) years nor more than thirty (30) years;

(D) For a conviction of a Class C felony, a term of imprisonment of not less than three (3) years nor more than twenty (20) years;

(E) For a conviction of a Class D felony, a term of imprisonment of not more than twelve (12) years;

(F) For a conviction of an unclassified felony punishable by less than life imprisonment, a term of imprisonment not more than five (5) years more than the maximum sentence for the unclassified felony; and

(G) For a conviction of an unclassified felony punishable by life imprisonment, a term of imprisonment not less than ten (10) years nor more than fifty (50) years, or life.

(b)(1) A defendant meeting the following criteria may be sentenced to pay any fine authorized by law for the felony conviction and to an extended term of imprisonment as set forth in subdivision (b)(2) of this section:

(A) A defendant who:

(i) Is convicted of a felony other than a felony enumerated in subsections (c) and (d) of this section committed after June 30, 1993; and

(ii) Has previously been convicted of four (4) or more felonies or who has been found guilty of four (4) or more felonies;

(B) A defendant who:

(i) Is convicted of any felony enumerated in subsection (c) of this section committed after June 30, 1997; and

(ii) Has previously been convicted of four (4) or more felonies not enumerated in subsection (c) of this section or who has been found guilty of four (4) or more felonies not enumerated in subsection (c) of this section; or

(C) A defendant who:

(i) Is convicted of any felony enumerated in subsection (d) of this section committed after June 30, 1997; and

(ii) Has previously been convicted of four (4) or more felonies not enumerated in subsection (d) of this section or who has been found guilty of four (4) or more felonies not enumerated in subsection (d) of this section.

(2) The extended term of imprisonment for a defendant described in subdivision (b)(1) of this section is as follows:



(A) For a conviction of a Class Y felony, a term of imprisonment of not less than ten (10) years nor more than life;

(B) For a conviction of a Class A felony, a term of imprisonment of not less than six (6) years nor more than sixty (60) years;

(C) For a conviction of a Class B felony, a term of imprisonment of not less than five (5) years nor more than forty (40) years;

(D) For a conviction of a Class C felony, a term of imprisonment of not less than three (3) years nor more than thirty (30) years;

(E) For a conviction of a Class D felony, a term of imprisonment of not more than fifteen (15) years;

(F) For a conviction of an unclassified felony punishable by less than life imprisonment, a term of imprisonment not more than two (2) times the maximum sentence for the unclassified felony offense; and

(G) For a conviction of an unclassified felony punishable by life imprisonment, a term of imprisonment not less than ten (10) years nor more than fifty (50) years, or life.

(c)(1) Except as provided in subdivision (c)(3) of this section, a defendant who is convicted of a serious felony involving violence enumerated in subdivision (c)(2) of this section and who previously has been convicted of one (1) or more of the serious felonies involving violence enumerated in subdivision (c)(2) of this section may be sentenced to pay any fine authorized by law for the serious felony involving violence conviction and shall be sentenced:

(A) To imprisonment for a term of not less than forty (40) years nor more than eighty (80) years, or life; and

(B) Without eligibility for parole or community correction transfer except under § 16-93-615.

(2) As used in this subsection, "serious felony involving violence" means:

(A) Any of the following felonies:

(i) Murder in the first degree, § 5-10-102;

(ii) Murder in the second degree, § 5-10-103;

(iii) Kidnapping, § 5-11-102, involving an activity making it a Class Y felony;

(iv) Aggravated robbery, § 5-12-103;

(v) Terroristic act, § 5-13-310, involving an activity making it a Class Y felony;

(vi) Rape, § 5-14-103;

(vii) Sexual assault in the first degree, § 5-14-124;

(viii) Causing a catastrophe, § 5-38-202(a); or

(ix) Aggravated residential burglary, § 5-39-204; or

(B) A conviction of a comparable serious felony involving violence from another jurisdiction.

(3) A defendant who is convicted of rape, § 5-14-103, or sexual assault in the first degree, § 5-14-124, involving a victim less than fourteen (14) years of age and who has previously been convicted of one (1) or more of the serious felonies involving violence enumerated in

subdivision (c)(2) of this section may be sentenced to pay any fine authorized by law for the rape or sexual assault in the first degree conviction and shall be sentenced to life in prison without the possibility of parole.

(4)(A) The following procedure governs a trial at which a sentence to an extended term of imprisonment is sought pursuant to this subsection:

(i) The jury shall first hear all evidence relevant to the serious felony involving violence with which the defendant is currently charged and shall retire to reach a verdict of guilt or innocence on this charge;

(ii)(a) If the defendant is found guilty of the serious felony involving violence, out of the hearing of the jury the trial court shall hear evidence of whether the defendant has pleaded guilty or nolo contendere to or been found guilty of a prior serious felony involving violence and shall determine the number of prior serious felony involving violence convictions, if any.

(b) The defendant has the right to hear and controvert evidence described in subdivision (c)(4)(A)(ii)(a) of this section and to offer evidence in his or her support;

(iii)(a) The trial court shall then instruct the jury as to the number of prior convictions for a serious felony involving violence and the statutory sentencing range.

(b) The jury may be advised as to the nature of a prior serious felony involving violence conviction and the date and place of a prior serious felony involving violence conviction; and

(iv) The jury shall retire again and then determine a sentence within the statutory range.

(B) The determination of whether a felony conviction from another jurisdiction is comparable to an enumerated serious felony involving violence under Arkansas criminal law lies within the discretion of the trial judge at the time of sentencing.

(d)(1) A defendant who is convicted of a felony involving violence enumerated in subdivision (d)(2) of this section and who previously has been convicted of two (2) or more of the felonies involving violence enumerated in subdivision (d)(2) of this section may be sentenced to pay any fine authorized by law for the felony involving violence conviction and shall be sentenced to an extended term of imprisonment without eligibility for parole or community correction transfer except under § 16-93-615 as follows:

(A) For a conviction of a Class Y felony, a term of imprisonment of not less than life in prison;

(B) For a conviction of a Class A felony, a term of imprisonment of not less than forty (40) years nor more than life in prison;

(C) For a conviction of a Class B felony or for a conviction of an unclassified felony punishable by life imprisonment, a term of imprisonment of not less than thirty (30) years nor more than sixty (60) years;



(D) For a conviction of a Class C felony, a term of imprisonment of not less than twenty-five (25) years nor more than forty (40) years;

(E) For a conviction of a Class D felony, a term of imprisonment of not less than twenty (20) years nor more than forty (40) years; and

(F) For a conviction of an unclassified felony punishable by less than life imprisonment, a term of imprisonment not more than three (3) times the maximum sentence for the unclassified felony offense.

(2) As used in this subsection, "felony involving violence" means:

(A) Any of the following felonies:

(i) Murder in the first degree, § 5-10-102;

(ii) Murder in the second degree, § 5-10-103;

(iii) Kidnapping, § 5-11-102;

(iv) Aggravated robbery, § 5-12-103;

(v) Rape, § 5-14-103;

(vi) Battery in the first degree, § 5-13-201;

(vii) Terroristic act, § 5-13-310;

(viii) Sexual assault in the first degree, § 5-14-124;

(ix) Sexual assault in the second degree, § 5-14-125;

(x) Domestic battering in the first degree, § 5-26-303;

(xi) Aggravated residential burglary, § 5-39-204;

(xii) Unlawful discharge of a firearm from a vehicle, § 5-74-107;

(xiii) Criminal use of prohibited weapons, § 5-73-104, involving an activity making it a Class B felony; or

(xiv) A felony attempt, solicitation, or conspiracy to commit:

(a) Capital murder, § 5-10-101;

(b) Murder in the first degree, § 5-10-102;

(c) Murder in the second degree, § 5-10-103;

(d) Kidnapping, § 5-11-102;

(e) Aggravated robbery, § 5-12-103;

(f) Rape, § 5-14-103;

(g) Battery in the first degree, § 5-13-201;

(h) Domestic battering in the first degree, § 5-26-303; or

(i) Aggravated residential burglary, § 5-39-204; or

(B) A conviction of a comparable felony involving violence from another jurisdiction.

(3)(A) The following procedure governs a trials at which a sentence to an extended term of imprisonment is sought pursuant to this subsection:

(i) The jury shall first hear all evidence relevant to the felony involving violence with which the defendant is currently charged and shall retire to reach a verdict of guilt or innocence on this charge;

(ii)(a) If the defendant is found guilty of the felony involving violence, out of the hearing of the jury the trial court shall hear evidence of whether the defendant has pleaded guilty or nolo contendere to or been found guilty of two (2) or more prior felonies involving violence and shall determine the number of prior felony involving violence convictions, if any.

(b) The defendant has the right to hear and controvert evidence described in subdivision (d)(3)(A)(ii)(a) of this section and to offer evidence in his or her support;

(iii)(a) The trial court shall then instruct the jury as to the number of prior felony involving violence convictions and the statutory sentencing range.

(b) The jury may be advised as to the nature of a prior felony involving violence conviction and the date and place of a prior felony involving violence conviction; and

(iv) The jury shall retire again and then determine a sentence within the statutory range.

(B) The determination of whether a felony conviction from another jurisdiction is comparable to an enumerated felony involving violence under Arkansas criminal law lies within the discretion of the trial judge at the time of sentencing.

(e)(1) For the purpose of determining whether a defendant has previously been convicted or found guilty of two (2) or more felonies, a conviction or finding of guilt of burglary, § 5-39-201, and of the felony that was the object of the burglary are considered a single felony conviction or finding of guilt.

(2) A conviction or finding of guilt of an offense that was a felony under the law in effect prior to January 1, 1976, is considered a previous felony conviction or finding of guilt.

(f) For the purposes of determining whether a defendant has previously been convicted of a serious felony involving violence or a felony involving violence under subsections (c) and (d) of this section, the entry of a plea of guilty or nolo contendere or a finding of guilt by a court to a felony enumerated in subsections (c) and (d) of this section, respectively, as a result of which a court places the defendant on a suspended imposition of sentence, a suspended sentence, or probation, or sentences the defendant to the Department of Correction, is considered a previous felony conviction.

(g) Any defendant deemed eligible to be sentenced under a provision of both subsections (c) and (d) of this section shall be sentenced only under subsection (d) of this section.

(h) If the provisions of subsection (c) or (d) of this section, or both, are held invalid by a court, the defendant's case shall be remanded to the trial court for resentencing of the defendant under the provisions of subsections (a) and (b) of this section.

**History.** Acts 1975, No. 280, § 1001; 1977, No. 474, § 4; 1981, No. 620, § 9; 1983, No. 409, § 3; A.S.A. 1947, § 41-1001; Acts 1993, No. 532, § 7; 1993, No. 550, § 7; 1995, No. 1009, § 1; 1995, No. 1011, § 1; 1997, No. 1197, § 1; 2001, No. 1553, § 6; 2003, No. 1390, § 2; 2006 (1st Ex. Sess.), No. 5, § 1; 2007, No. 827, §§ 15, 16; No. 852, § 1; 2009, No. 1395, §§ 1, 2; 2011, No. 570, §§ 19, 20.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

**Amendments.** The 2009 amendment added (c)(2)(ix); inserted present (d)(2)(A)(xi) and redesignated the remaining subdivisions accordingly; added



(d)(2)(A)(xiv)(i); and made related changes.

The 2011 amendment substituted “§ 16-93-615” for “§ 16-93-1302” in (c)(1)(B) and (d)(1).

## RESEARCH REFERENCES

**ALR.** Construction and Application of Constitutional Provisions Proscribing U.S. Const. Art. I, § 10, cl. 1, and State State Bills of Attainder. 63 A.L.R.6th 1.

## CASE NOTES

### ANALYSIS

In General.  
Construction.  
Information.  
Propriety of Sentence.  
Retrial.  
Sentences.

#### In General.

Purpose of the statute is to punish repeat offenders severely. *Misenheimer v. State*, 100 Ark. App. 189, 265 S.W.3d 764 (2007).

#### Construction.

Court must give the words of the statute their ordinary meaning. *Misenheimer v. State*, 100 Ark. App. 189, 265 S.W.3d 764 (2007).

Statute is unambiguous. *Misenheimer v. State*, 100 Ark. App. 189, 265 S.W.3d 764 (2007).

#### Information.

Even though a prosecutor was not allowed to amend a felony information under § 16-85-407 in a theft of property case to show the value of a vehicle stolen since that changed the class of the crime, there was no reversible error because the sentence imposed was less than the maximum for either the amended or the original charge. Therefore, defendant was not prejudiced. *Ward v. State*, 97 Ark. App. 294, 248 S.W.3d 489 (2007).

Circuit court did not err in sentencing defendant as a habitual offender because there was no error in the form of the amended felony information; the amended felony information incorporated by reference the charges included in the original information and quoted the habitual-offender statute, and that was sufficient to alert defendant to the fact that he could be

sentenced as a habitual offender and that his prior convictions could be considered in assessing an enhanced sentence. *Glaze v. State*, 2011 Ark. 464, 385 S.W.3d 203 (2011), appeal dismissed, 2013 Ark. 141, — S.W.3d — (2013).

There was no error in the timing of the amendment of the felony information because the amendment did not change the nature of the crime charged, and there was no basis for concluding that defendant was unfairly surprised by the state's amended felony information; prior to the filing of the amended felony information, defendant received a certified copy of the judgment and commitment order convicting him of three prior felonies. *Glaze v. State*, 2011 Ark. 464, 385 S.W.3d 203 (2011), appeal dismissed, 2013 Ark. 141, — S.W.3d — (2013).

#### Propriety of Sentence.

Saline County court did not err in sentencing defendant as a habitual offender under subsection (b) of this section after defendant was convicted of felonies in Pulaski County where two days separated defendant's theft of a pick-up truck and defendant's crimes during a high-speed chase. Defendant's crimes involved multiple acts, harmed different people, and occurred at different locations in different counties. *Misenheimer v. State*, 100 Ark. App. 189, 265 S.W.3d 764 (2007).

Petitioner's 900-month prison sentence as a habitual offender for the offenses of aggravated robbery, theft of property, and two counts of second-degree battery was not illegal because the sentence was within the range provided in subdivision (b)(2)(A) of this section. *Reed v. Hobbs*, 2012 Ark. 61, — S.W.3d — (2012).

Trial court did not err in sentencing defendant to 30 years in prison as a ha-

bitual offender because defendant was convicted of four Class C felonies and one Class B felony, and therefore faced a maximum sentence of 160 years in prison as a habitual offender under subdivisions (b)(2)(C) and (D) of this section. *Turner v. State*, 2012 Ark. App. 150, 391 S.W.3d 358 (2012).

Upon defendant's conviction for rape and second-degree battery, the circuit court erred in ordering him to complete a sex-offender treatment program because he was sentenced under § 5-4-401 and this section—these statutes did not authorize the court to order a sex-offender treatment program. *White v. State*, 2012 Ark. 221, — S.W.3d — (2012).

Inmate's appeal of the denial of the inmate's petition to correct an illegal sentence, pursuant to § 16-90-111, was dismissed because (1) Ark. R. Crim. P. 37.2(b) said all postconviction relief grounds cognizable under Ark. R. Crim. P. 37.1 had to be raised in a Rule 37.1 petition filed within 90 days of the date of judgment when a defendant pled guilty, even though Ark. Code Ann. § 16-90-111 let a trial court correct an illegal sentence at any time, as the statute was superseded to the extent the statute conflicted with the Rule's time limits, (2) the petition was filed over six years after judgment was entered, (3) the time limits in Ark. R. Crim. P. 37.2 were jurisdictional, denying a trial court jurisdiction if the time limits were not met, and, on appeal, a reviewing court, and (4) the inmate's sentence was within the prescribed statutory ranges in subdivision (b)(2)(A) of this section and § 5-4-401(b)(1). *Redus v. State*, 2013 Ark. 9, — S.W.3d —, 2013 Ark. LEXIS 15 (Jan. 17, 2013).

Where defendant was guilty of violating § 5-64-401(a)(1) (repealed by 2011 Ark. Acts 570, § 33) and § 5-64-403(c)(5) and the circuit court sentenced him as a habitual offender pursuant to the this section, the sentence was nonetheless illegal because under subdivision § 5-64-301(a)(2), the circuit court did not have the authority to suspend 10 years of the 15-year sentence it imposed. *State v. O'Quinn*, 2013 Ark. 219, — S.W.3d — (2013).

### Retrial.

Where defendant was convicted of delivery of methamphetamine, defendant pled

guilty to eight other felony drug charges during the pendency of his appeal; after his first case was reversed and remanded, the state did not err by using the felony convictions to amend the information to allege that defendant was subject to punishment as a habitual offender under this section. During defendant's new trial, the circuit court did not err in instructing the jury of defendant's habitual-offender status; defendant was clearly eligible for an enhanced sentence. *Phavixay v. State*, 2009 Ark. 452, 352 S.W.3d 311 (2009).

### Sentences.

Because defendant pled guilty to a Class C felony as a habitual offender, the circuit court was required to sentence her in accordance with § 5-4-301(a)(2) and subdivision (a)(2)(D) of this section, and the circuit court exceeded its statutory authority when it placed defendant on probation; defendant knew about the statute's sentencing range and, at the time of defendant's plea in open court, the circuit court expressly reiterated that her offense carried with it a sentencing range of three to twenty years' imprisonment. *State v. Joslin*, 364 Ark. 545, 222 S.W.3d 168 (2006).

In a case involving a habitual offender, a 15-year sentence imposed for felony weapon possession was illegal because the maximum sentence allowed under § 5-4-501(a)(2)(E) was 12 years. *Ward v. State*, 97 Ark. App. 294, 248 S.W.3d 489 (2007).

Circuit court erred in sentencing defendant under § 16-90-201 because the statute was repealed by implication with the enactment of this section, and the effect of sentencing defendant under § 16-90-201 was prejudicial since there was the possibility that the jury would have returned a sentence less than the minimum set forth in § 16-90-201; because sentencing had to be determined by the law in effect at the time of the commission of a crime, defendant was entitled to a jury instruction in accordance with this section, the Criminal Code's habitual-offender statute. *Glaze v. State*, 2011 Ark. 464, 385 S.W.3d 203 (2011), appeal dismissed, 2013 Ark. 141, — S.W.3d — (2013).

General Assembly clearly took up the subject matter of the enhanced sentencing of habitual offenders anew in this section, the more current statute, and the conflict between § 16-90-201 and this section is



irreconcilable, resulting in a repeal by implication of § 16-90-201; a plain reading of this section and § 16-90-201 makes clear that this section is the more comprehensive statute, covering the same subject matter as § 16-90-201 as well as including additional provisions to provide for the sentencing of habitual offenders who are convicted of serious and violent felonies, and it is further evident that the two statutes cannot be read together harmoniously, as the two statutes cannot be read together harmoniously, as the sentencing ranges prescribed by each statute conflict. *Glaze v. State*, 2011 Ark. 464, 385 S.W.3d 203 (2011), appeal dismissed, 2013 Ark. 141, — S.W.3d — (2013).

Defendant's sentence was proper under §§ 5-4-501 to 5-4-504 because the reference, "Attorney: Public Defender," was sufficient to prove that defendant was represented by counsel regarding his Illinois conviction for aggravated robbery. There was no supplemental testimony explaining the reference, but it was clear that a "public defender" could only reasonably reference representation for defendant; thus, the designated reference in the pen pack was sufficient to satisfy the state's burden in the case. *Anthony v. State*, 2011 Ark. App. 660, — S.W.3d — (2011).

Denial of writ of habeas corpus was proper, because life imprisonment for ag-

gravated robbery was within the statutory range, irrespective of any enhancement as a habitual offender, and a sentence that was within the prescribed range was not illegal. *Goins v. Norris*, 2012 Ark. 192, — S.W.3d — (2012).

In an aggravated robbery case where habitual offender status was at issue, a trial court did not err by refusing to give the jury an instruction on the sentences that appellant had received in federal court for prior bank robbery convictions because it was within the trial court's discretion to do so, pursuant to § 16-97-103(2). *Walden v. State*, 2012 Ark. App. 307, — S.W.3d — (2012).

In an aggravated robbery case, an issue relating to a motion for a new trial was preserved for appellate review because an oral motion prior to the entry of the judgment and commitment order was made in open court, the state was aware that the motion had been made, and the state was given an opportunity to respond. However, because appellant received a sentence within the statutory range short of the maximum, he was not prejudiced by a victim-impact statement, and a new trial was not warranted; appellant received a 60-year term of imprisonment, but the maximum he could have received was life in prison. *Walden v. State*, 2012 Ark. App. 307, — S.W.3d — (2012).

## 5-4-502. Habitual offenders — Sentencing procedure.

### CASE NOTES

#### Instruction.

In an aggravated robbery case where habitual offender status was at issue, a trial court did not err by refusing to give the jury an instruction on the sentences that appellant had received in federal

court for prior bank robbery convictions because it was within the trial court's discretion to do so, pursuant to § 16-97-103(2). *Walden v. State*, 2012 Ark. App. 307, — S.W.3d — (2012).

## 5-4-504. Habitual offenders — Proof of previous conviction.

### CASE NOTES

**Cited:** *Ray v. State*, 2009 Ark. 521, — S.W.3d — (2009).

SUBCHAPTER 6 — TRIAL AND SENTENCE — CAPITAL MURDER

SECTION.

5-4-603. Findings required for death sentence — Harmless error review.

SECTION.

5-4-617. Method of execution.

**Effective Dates.** Acts 2013, No. 139, § 4: Feb. 20, 2013. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the current procedures for the administration of the sentence of lethal injection have been declared unconstitutional by the Supreme Court; and that this act is immediately necessary because the constitutional administration of a lethal injection to the state’s most dangerous convicted persons furthers the health, safety, and welfare of the people of Arkan-

sas. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

5-4-601. Legislative intent.

CASE NOTES

Juveniles.

Circuit court erred by denying appellant juvenile’s petition for writ of habeas corpus; because he was only fourteen years old when he committed capital-murder and aggravated-robbery, his mandatory sentence of life imprisonment without parole violated the Eighth Amendment, U.S. Const. amend. VIII. In

considering the capital-murder statute as it pertained to juveniles, the Supreme Court of Arkansas severed portions of § 5-10-101(c) which provided that capital murder was punishable by death or life imprisonment without parole pursuant to this section and §§ 5-4-605, 5-4-607, and 5-4-608. Jackson v. Norris, 2013 Ark. 175, — S.W.3d — (2013).

5-4-602. Capital murder charge — Trial procedure.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.



## CASE NOTES

## ANALYSIS

Evidence.

Mitigating Circumstances.

Victim Impact Evidence.

—Constitutionality.

—In General.

—Relevance.

**Evidence.**

It was not clear whether the testimony of a psychologist regarding the state death-row inmate's social history would have been admissible pursuant to subdivision (4)(B) of this section at the penalty phase of the inmate's capital murder trial without other witnesses providing a factual foundation for his opinions; although, at the time of the inmate's trial, expert testimony presenting social history as mitigating evidence at the penalty phase of Arkansas capital cases was not uncommon, other witnesses, usually the inmate, also testified and provided factual foundation for the expert's opinions. While the federal district court allowed this evidence at the inmate's evidentiary hearing under 28 U.S.C.S. § 2254(e)(2), the state trial court in a Ark. R. Crim. P. 37 evidentiary proceeding was in the best position to consider this issue. *Williams v. Norris*, 576 F.3d 850 (8th Cir. 2009).

**Mitigating Circumstances.**

Granting of petitioner's, an inmate's, petition to reinvest jurisdiction in the trial court to pursue a petition for writ of error coram nobis on the issue of the state's failure to disclose a sheriff's report concerning the inmate's childhood abuse was proper because the claim had apparent merit, which the circuit court should evaluate under subdivision (4)(B)(ii) of this section. *Howard v. State*, 2012 Ark. 177, — S.W.3d — (2012), cert. denied, *Howard v. Arkansas*, — U.S. —, 133 S. Ct. 528, 184 L. Ed. 2d 345, 2012 U.S. LEXIS 8457 (U.S. 2012).

**Victim Impact Evidence.**

State inmate, who was convicted of murder and sentenced to death, was not entitled to federal habeas relief based on the admission of victim impact testimony under this section; application of the victim impact evidence statute, which was

passed after the crime was committed, did not violate the Ex Post Facto Clause because the statute was procedural in nature. Also, the Arkansas Supreme Court did not unreasonably apply federal law in finding no Sixth Amendment violation, as victim impact testimony was not an aggravating circumstance, and in finding no requirement that the jury be specifically instructed about how to consider the evidence. *Johnson v. Norris*, 537 F.3d 840 (8th Cir. 2008), rehearing denied, — F.3d —, 2008 U.S. App. LEXIS 28328 (8th Cir. Ark. Sept. 11, 2008), cert. denied, — U.S. —, 129 S. Ct. 1334, 173 L. Ed. 2d 605 (2009).

In a capital murder case, the state was properly allowed to present three witnesses who discussed the impact of the victims' deaths because this section did not declare what victim-impact evidence was relevant in any given case — that issue was decided by the circuit court, and victim-impact evidence was relevant to assist the jury in imposing punishment based on a measurement of the injury to society. *Thomas v. State*, 370 Ark. 70, 257 S.W.3d 92 (2007), rehearing denied, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 397 (June 21, 2007), cert. denied, *Thomas v. Arkansas*, 552 U.S. 1025, 128 S. Ct. 620, 169 L. Ed. 2d 399, 2007 U.S. LEXIS 12155 (2007).

**—Constitutionality.**

Where habeas petitioner argued that his trial counsel was ineffective for failing to challenge the Arkansas victim impact statute as unconstitutional, counsel was not ineffective because subdivision (4) of this section was not unconstitutional, and the petitioner failed to show how the victim impact testimony in his case prejudiced him or violated his constitutional rights. *Jackson v. Norris*, 468 F. Supp.2d 1030 (E.D. Ark. 2007), vacated, 2007 U.S. App. LEXIS 27006 (8th Cir. Ark. 2007).

**—In General.**

Subdivision (4) of this section is not in conflict with §§ 5-4-603 through 5-4-605 and the Arkansas Rules of Evidence because victim-impact evidence is relevant to punishment separately from aggravating and mitigating circumstances. *Anderson v. State*, 367 Ark. 536, 242 S.W.3d 229

(2006), cert. denied, *Anderson v. Arkansas*, 551 U.S. 1133, 127 S. Ct. 2973, 168 L. Ed. 2d 707 (2007).

—**Relevance.**

In defendant's trial for capital murder, the testimony of the victim's father, two sisters, and one of her children was not unduly prejudicial but rather was relevant to show the impact her death had on her family, which was precisely the purpose envisioned by the Arkansas General Assembly in enacting subdivision (4) of

this section; thus, the trial court did not abuse its discretion in admitting victim-impact evidence during defendant's sentencing because such evidence was relevant under the Arkansas capital-murder-sentencing process. *Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006), cert. denied, 550 U.S. 939, 127 S. Ct. 2257, 167 L. Ed. 2d 1100 (2007).

**Cited:** *Thessing v. State*, 365 Ark. 384, 230 S.W.3d 526 (2006); *Dimas-Martinez v. State*, 2011 Ark. 515, 385 S.W.3d 238 (2011).

**5-4-603. Findings required for death sentence — Harmless error review.**

(a) The jury shall impose a sentence of death if the jury unanimously returns written findings that:

- (1) An aggravating circumstance exists beyond a reasonable doubt;
- (2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and
- (3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.

(b) The jury shall impose a sentence of life imprisonment without parole if the jury finds that:

- (1) Aggravating circumstances do not exist beyond a reasonable doubt;
- (2) Aggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist; or
- (3) Aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.

(c) If the jury does not make any finding required by subsection (a) of this section, the court shall impose a sentence of life imprisonment without parole.

(d)(1) On an appellate review of a death sentence, the Supreme Court shall conduct a harmless error review of the defendant's death sentence if:

(A) The Supreme Court finds that the jury erred in finding the existence of any aggravating circumstance for any reason; and

(B) The jury found no mitigating circumstance.

(2) The Supreme Court shall conduct a harmless error review under subdivision (d)(1) of this section by determining that a remaining aggravating circumstance:

(A) Exists beyond a reasonable doubt; and

(B) Justifies a sentence of death beyond a reasonable doubt.

(e) If the Supreme Court concludes that the erroneous finding of any aggravating circumstance by the jury would not have changed the jury's decision to impose the death penalty on the defendant, then a simple majority of the court may vote to affirm the defendant's death sentence.



**History.** Acts 1975, No. 280, § 1302; 1977, No. 474, § 11; A.S.A. 1947, § 41-1302; Acts 1987, No. 412, § 1.

**Publisher's Notes.** This section is being set out to reflect corrections in (a)(2) and (b)(2).

RESEARCH REFERENCES

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES

ANALYSIS

Constitutionality.  
Aggravating or Mitigating Circumstances.  
Construction With Other Law.  
Death Penalty.  
Jury Instructions.  
Victim Impact Evidence.

**Constitutionality.**

This section is not facially unconstitutional on grounds that it does not permit the jury to give adequate effect to mitigating evidence. *Williams v. Norris*, 576 F.3d 850 (8th Cir. 2009).

**Aggravating or Mitigating Circumstances.**

Because a jury clearly erred in finding the aggravating circumstance of an underlying robbery when defendant was trying to recover from the murder victim money that he had lost gambling in a card game with the victim, harmless error analysis was not required. *Daniels v. State*, 373 Ark. 536, 285 S.W.3d 205 (2008), superseded by statute as stated in, *Heard v. State*, 2009 Ark. 546, 354 S.W.3d 49 (2009).

Petitioner's death sentence could not stand because the manner in which the jury completed its form allowed only the conclusion that it eliminated from its consideration all evidence presented of mitigating circumstances and sentenced petitioner to death solely based on an aggravating circumstance, which was reversible error. *Williams v. State*, 2011 Ark. 534, — S.W.3d — (2011).

**Construction With Other Law.**

Section 5-4-602(4) is not in conflict with §§ 5-4-603 through 5-4-605 and the Arkansas Rules of Evidence because victim-impact evidence is relevant to punishment

separately from aggravating and mitigating circumstances. *Anderson v. State*, 367 Ark. 536, 242 S.W.3d 229 (2006), cert. denied, *Anderson v. Arkansas*, 551 U.S. 1133, 127 S. Ct. 2973, 168 L. Ed. 2d 707 (2007).

**Death Penalty.**

Denial of defendant's motion to prohibit the state from seeking the death penalty on retrial of the charge of capital murder was appropriate because there was no acquittal of the death penalty when the circuit court imposed the life sentence as required by law after the jury deadlocked on the penalty issue and then the circuit court imposed the sentence of life without parole as a matter of law, under subsection (c) of this section. *Osburn v. State*, 2011 Ark. 406, — S.W.3d — (2011).

**Jury Instructions.**

Judge's instruction during the sentencing phase in a capital murder case that the jury could not, consistent with the law and the evidence, find that no evidence of mitigating circumstances had been presented, did not violate a habeas petitioner's rights under the Sixth and Eighth Amendments because the judge promoted, rather than obstructed, the jury's consideration of mitigating evidence. *Jackson v. Norris*, 468 F. Supp.2d 1030 (E.D. Ark. 2007), vacated, 2007 U.S. App. LEXIS 27006 (8th Cir. Ark. 2007).

Where habeas petitioner argued that his trial counsel was ineffective for failing to object to the trial court's handling of the jury's error concerning the existence of mitigating circumstances, even assuming that the petitioner could show deficient performance in the failure to object, the failure to object had no effect on the jury's imposition of the death penalty because the trial court made no error in instructing the jury during the penalty phase.

Jackson v. Norris, 468 F. Supp.2d 1030 (E.D. Ark. 2007), vacated, 2007 U.S. App. LEXIS 27006 (8th Cir. Ark. 2007).

### **Victim Impact Evidence.**

Harmless error analysis under this section did not apply in reviewing the propriety of victim impact statements in which the victim's survivors testified that they wished the jury to impose the death sen-

tence, because the alleged error in admitting the statements did not challenge the jury's finding of aggravating circumstances. Miller v. State, 2010 Ark. 1, 362 S.W.3d 264 (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 95 (Feb. 12, 2010).

**Cited:** Thessing v. State, 365 Ark. 384, 230 S.W.3d 526 (2006); Thomas v. State, 370 Ark. 70, 257 S.W.3d 92 (2007).

## **5-4-604. Aggravating circumstances.**

### **RESEARCH REFERENCES**

**ALR.** Validity, Construction, and Application of Aggravating and Mitigating Provisions of Death Penalty Statutes — Supreme Court Cases. 21 A.L.R. Fed. 2d 1.

Construction and Application of United States Sentencing Guideline § 2A2.1(b)(1), 18 U.S.C.A., Providing En-

hancement for Attempted Murder or Assault with Intent to Commit Murder Dependent Upon Nature or Degree of Injury. 30 A.L.R. Fed. 2d 385.

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

### **CASE NOTES**

#### **ANALYSIS**

Accomplice Testimony.  
Cruel or Depraved Manner.  
Pecuniary Gain.  
Prior Offenses.  
Proof.  
Victim Impact Evidence.

### **Accomplice Testimony.**

Defendant's sentence of death after he was convicted of two counts of capital murder was appropriate under former § 41-1303(4) because a victim's mother testified that she found the victims' child in their home, near his father's lifeless body, and shotgun shells were found both in the living room, where the child was found, as well as in a bedroom in which was the child's crib. Prior to the murders occurring, defendant told an accomplice that children might be present and that those over eight would need to be eliminated as possible witnesses. Wertz v. State, 374 Ark. 256, 287 S.W.3d 528 (2008).

### **Cruel or Depraved Manner.**

State inmate, who was convicted of murder and sentenced to death, was not entitled to federal habeas relief based on a claim that the "especially cruel manner"

aggravating circumstance under subdivision (8) of this section was unconstitutionally vague or overbroad; the United States Supreme Court had upheld a nearly identical statute against an Eighth Amendment vagueness challenge, and it was not unreasonable for the Arkansas Supreme Court to have concluded that the aggravating circumstance genuinely narrowed the class of death-eligible persons. Johnson v. Norris, 537 F.3d 840 (8th Cir. 2008), rehearing denied, — F.3d —, 2008 U.S. App. LEXIS 28328 (8th Cir. Ark. Sept. 11, 2008), cert. denied, — U.S. —, 129 S. Ct. 1334, 173 L. Ed. 2d 605 (2009).

In the death-row inmate's case, the jury's unanimous finding as an aggravating circumstance that capital murder was committed in an especially cruel or depraved manner under subdivision (8)(A) of this section was supported by constitutionally sufficient evidence since the circumstantial evidence in the record allowed a rational jury to find the requisite intent to inflict mental anguish, serious physical abuse, or torture. Williams v. Norris, 576 F.3d 850 (8th Cir. 2009).

After defendant's conviction of capital murder, the jury that sentenced him to death properly found the existence of aggravating factors involving cruelty and depravity, as evidence that defendant



broke into the victim's apartment, waited hours for her to return, and then viciously attacked her as she walked in the door, stabbing her several times, was sufficient to prove the murder was especially cruel or depraved. *Marcyniuk v. State*, 2010 Ark. 257, 373 S.W.3d 243 (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 402 (Aug. 6, 2010).

### **Pecuniary Gain.**

In a capital murder case, there was sufficient evidence that defendant murdered the victim for pecuniary gain where defendant took the victim's car, television set, silverware, Bible, and other items of personal property from her home after he killed her. *Thessing v. State*, 365 Ark. 384, 230 S.W.3d 526 (2006), cert. denied, *Thessing v. Arkansas*, 549 U.S. 891, 127 S. Ct. 193, 166 L. Ed. 2d 158 (2006).

In the death-row inmate's capital murder trial, the pecuniary gain statutory aggravating factor did not unconstitutionally fail to narrow the class of death-eligible offenders on the ground that it merely duplicated an element of the underlying crime of felony murder during the course of a robbery, because the jury in the inmate's case was not instructed that the felony underlying the charge of capital murder was robbery; rather, the jury was instructed that the underlying felony was kidnapping, pursuant to § 5-10-101(a)(1)(iii), and that, consistent with the statutory definition of kidnapping under § 5-11-102(a)(3)-(5), it had to find that the inmate had restrained the victim with the purpose of inflicting physical injury upon her or engaging in sexual intercourse or sexual contact, or of committing aggravated robbery or any flight thereafter. After convicting the inmate of capital murder, the jury found in the penalty phase that he committed the murder for pecuniary gain, consistent with subdivision (6) of this section; thus, there was no duplication of constitutional dimension or otherwise. *Williams v. Norris*, 576 F.3d 850 (8th Cir. 2009).

### **Prior Offenses.**

Consideration of a death-row inmate's prior conviction for a robbery that he committed when he was 15 years old as an aggravating factor under subdivision (3) of this section did not violate the Eighth Amendment because, in 1988, years before the inmate's capital murder trial, a plurality of the United States Supreme Court wrote that execution of a 15-year-old would violate the Eighth Amendment; thus, the argument that the inmate belatedly sought to raise before the federal habeas court was not so novel that its legal basis was not reasonably available to him in state court. *Williams v. Norris*, 576 F.3d 850 (8th Cir. 2009).

### **Proof.**

In a capital murder case, there was sufficient evidence that the victim had a temporary or permanent physical disability where the victim was 67 years old, overweight, and had recently undergone chemotherapy and radiation treatments; in light of the fact that the victim was beaten to death without being able to flee or defend herself and the fact that he had been to her house before, substantial evidence existed to support the jury's verdict regarding the aggravating circumstance. *Thessing v. State*, 365 Ark. 384, 230 S.W.3d 526 (2006), cert. denied, *Thessing v. Arkansas*, 549 U.S. 891, 127 S. Ct. 193, 166 L. Ed. 2d 158 (2006).

### **Victim Impact Evidence.**

Section 5-4-602(4) is not in conflict with §§ 5-4-603 through 5-4-605 and the Arkansas Rules of Evidence because victim-impact evidence is relevant to punishment separately from aggravating and mitigating circumstances. *Anderson v. State*, 367 Ark. 536, 242 S.W.3d 229 (2006), cert. denied, *Anderson v. Arkansas*, 551 U.S. 1133, 127 S. Ct. 2973, 168 L. Ed. 2d 707 (2007).

**Cited:** *Thomas v. State*, 370 Ark. 70, 257 S.W.3d 92 (2007); *Dimas-Martinez v. State*, 2011 Ark. 515, 385 S.W.3d 238 (2011).

5-4-605. Mitigating circumstances.

RESEARCH REFERENCES

**ALR.** Validity, Construction, and Application of Aggravating and Mitigating Provisions of Death Penalty Statutes — Supreme Court Cases. 21 A.L.R. Fed. 2d 1.  
 Construction and Application of United States Sentencing Guideline

§ 2A2.1(b)(1), 18 U.S.C.A., Providing Enhancement for Attempted Murder or Assault with Intent to Commit Murder Dependent Upon Nature or Degree of Injury. 30 A.L.R. Fed. 2d 385.

CASE NOTES

ANALYSIS

Instructions.  
 State of Mind.  
 Trial Proceedings.  
 Victim Impact Evidence.  
 Youth of Defendant.

**Instructions.**

Where habeas petitioner argued that his trial counsel was ineffective for failing to object to a misstatement of law by the prosecution regarding mitigating circumstances in closing arguments during the sentencing phase of the petitioner’s capital murder trial, even assuming that the petitioner could show deficient performance in the failure to object, the failure to object did not result in prejudice to the petitioner because (1) the prosecution introduced its argument by reciting the exact language of subdivision (3) of this section, (2) Form 2 of the verdict form, which the trial court read aloud to the jury, also contained the exact language provided under subdivision (3), and (3) the trial court instructed the jury that it was not limited to the mitigating circumstances set forth in Form 2 and had discretion to find from the evidence that other mitigating circumstances probably existed. *Jackson v. Norris*, 468 F. Supp.2d 1030 (E.D. Ark. 2007), vacated, 2007 U.S. App. LEXIS 27006 (8th Cir. Ark. 2007).

**State of Mind.**

Where defendant was sentenced to death after his conviction of capital murder, as the jury acknowledged that he suffered from borderline-personality disorder and generalized anxiety disorder but found that those disorders did not prevent from being able to conform his behavior to the law and that he was not

under extreme mental or emotional disturbance at the time of the murder, the trial court met its obligation to bring before the jury mitigating factors regarding defendant’s mental disease or defect. *Marcyniuk v. State*, 2010 Ark. 257, 373 S.W.3d 243 (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 402 (Aug. 6, 2010).

**Trial Proceedings.**

Petitioner’s death sentence could not stand because the manner in which the jury completed its form allowed only the conclusion that it eliminated from its consideration all evidence presented of mitigating circumstances and sentenced petitioner to death solely based on an aggravating circumstance, which was reversible error. *Williams v. State*, 2011 Ark. 534, — S.W.3d — (2011).

**Victim Impact Evidence.**

Section 5-4-602(4) is not in conflict with §§ 5-4-603 through 5-4-605 and the Arkansas Rules of Evidence because victim-impact evidence is relevant to punishment separately from aggravating and mitigating circumstances. *Anderson v. State*, 367 Ark. 536, 242 S.W.3d 229 (2006), cert. denied, *Anderson v. Arkansas*, 551 U.S. 1133, 127 S. Ct. 2973, 168 L. Ed. 2d 707 (2007).

**Youth of Defendant.**

Circuit court erred by denying appellant juvenile’s petition for writ of habeas corpus; because he was only fourteen years old when he committed capital-murder and aggravated-robbery, his mandatory sentence of life imprisonment without parole violated the Eighth Amendment, U.S. Const. amend. VIII. In considering the capital-murder statute as it pertained to juveniles, the Supreme



Court of Arkansas severed portions of § 5-10-101(c) which provided that capital murder was punishable by death or life imprisonment without parole pursuant to this section and §§ 5-4-601, 5-4-607, and

5-4-608. *Jackson v. Norris*, 2013 Ark. 175, — S.W.3d — (2013).

**Cited:** *Thomas v. State*, 370 Ark. 70, 257 S.W.3d 92 (2007).

### **5-4-607. Application for executive clemency — Regulations.**

#### **CASE NOTES**

##### **Juvenile Offenders.**

Circuit court erred by denying appellant juvenile's petition for writ of habeas corpus; because he was only fourteen years old when he committed capital-murder and aggravated-robbery, his mandatory sentence of life imprisonment without parole violated the Eighth Amendment, U.S. Const. amend. VIII. In

considering the capital-murder statute as it pertained to juveniles, the Supreme Court of Arkansas severed portions of § 5-10-101(c) which provided that capital murder was punishable by death or life imprisonment without parole pursuant to this section and §§ 5-4-601, 5-4-605, and 5-4-608. *Jackson v. Norris*, 2013 Ark. 175, — S.W.3d — (2013).

### **5-4-608. Waiver of death penalty.**

#### **CASE NOTES**

##### **Juvenile Offenders.**

Circuit court erred by denying appellant juvenile's petition for writ of habeas corpus; because he was only fourteen years old when he committed capital-murder and aggravated-robbery, his mandatory sentence of life imprisonment without parole violated the Eighth Amendment, U.S. Const. amend. VIII. In

considering the capital-murder statute as it pertained to juveniles, the Supreme Court of Arkansas severed portions of § 5-10-101(c) which provided that capital murder was punishable by death or life imprisonment without parole pursuant to §§ 5-4-601, 5-4-605, 5-4-607, and this section. *Jackson v. Norris*, 2013 Ark. 175, — S.W.3d — (2013).

### **5-4-615. Conviction — Punishments.**

#### **CASE NOTES**

**Cited:** *Jackson v. Norris*, 2013 Ark. 175, — S.W.3d — (2013).

### **5-4-616. Procedures following remand of capital case after vacation of death sentence — Retroactive application.**

#### **CASE NOTES**

##### **Applicability.**

It was error for three murder victims' survivors to testify during the sentencing phase that they desired the jury to impose the death sentence; the testimony resulted in a violation of defendant's Eighth

Amendment rights. The case was remanded to the trial court for resentencing pursuant to this section. *Miller v. State*, 2010 Ark. 1, 362 S.W.3d 264 (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 95 (Feb. 12, 2010).

**5-4-617. Method of execution.**

(a) The Department of Correction shall carry out the sentence of death by intravenous lethal injection of a barbiturate in an amount sufficient to cause death.

(b) Before the intravenous lethal injection is administered, the condemned prisoner shall be intravenously administered a benzodiazepine.

(c) The drugs set forth in subsections (a) and (b) of this section shall be administered along with any substances that the manufacturer has mixed with the drugs and any additional substances, such as saline solution, called for in the manufacturer's instructions.

(d) Catheters, sterile intravenous solution, and other equipment used for the intravenous injection of the drugs set forth in subsections (a) and (b) of this section shall be sterilized and prepared in a manner that is safe and commonly performed in connection with the intravenous administration of drugs of that type.

(e) The Director of the Department of Correction shall develop logistical procedures necessary to carry out the sentence of death, including:

(1) The following matters:

(A) Ensuring that the drugs and substances set forth in subsections (a)-(d) of this section and other necessary supplies for the lethal injection are available for use on the scheduled date of the execution;

(B) Conducting employee orientation of the lethal injection procedure before the day of the execution;

(C) Logistics of the viewing;

(D) Coordinating with other governmental agencies involved with security and law enforcement;

(E) Transferring the condemned prisoner to the facility where the sentence of death will be carried out;

(F) Escorting the condemned prisoner from the holding cell to the execution chamber;

(G) The identity, arrival, and departure of the persons involved with carrying out the sentence of death at the facility where the sentence of death will be carried out; and

(H) Making arrangements for the disposition of the condemned prisoner's body and personal property; and

(2) The following matters pertaining to other logistical issues:

(A) Chaplaincy services;

(B) Visitation privileges;

(C) Determining the condemned prisoner's death, which must be pronounced according to accepted medical standards;

(D) Confirming the type and concentration of the drugs and substances set forth in subsections (a)-(d) of this section when they have been received by the department; and

(E) Establishing a protocol for any necessary mixing or reconstitution of the drugs and substances set forth in subsections (a)-(d) of this section in accordance with the manufacturer's instructions.



(f) The procedures for carrying out the sentence of death and related matters are not subject to the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(g) The procedures under subdivision (e)(1) of this section and the implementation of the procedures under subdivision (e)(1) of this section are not subject to disclosure under the Freedom of Information Act of 1967, § 25-19-101 et seq.

(h) The department shall carry out the sentence of death by electrocution if this section is invalidated by a final and unappealable court order.

**History.** Acts 1983, No. 774, §§ 1, 5, 6; A.S.A. 1947, §§ 41-1352, 41-1356, 41-1357; Acts 2009, No. 1296, § 2; 2013, No. 139, § 2.

**A.C.R.C. Notes.** Acts 2009, No. 1296, § 1 provided: "This act shall be known and may be cited as the 'Methods of Execution Act'."

Acts 2013, No. 139, § 1, provided: Legislative findings.

"(a) The laws of Arkansas impose the sentence of death for its most serious offenses. The General Assembly finds it necessary to provide a means of carrying out the sentence of death while also complying with the constitutional prohibition on cruel and unusual punishment.

"(b) To address objections to the method of lethal injection previously provided by law, the General Assembly finds that it should adopt a method of lethal injection that uses a barbiturate to bring about the death of the condemned prisoner.

"(c) The General Assembly finds that this measure meets those goals and satisfies the separation-of-powers doctrine by

setting forth the state's policy and the procedural guidelines for carrying out the sentence of death.

"(d) The General Assembly acknowledges that the manufacturers of the drugs set forth in this act may use preservatives or additives and recommend mixing or administering the drugs with sterile solutions such as saline. The General Assembly finds that these uses and recommendations are appropriate and would not conflict with the procedures set forth in this act."

Acts 2013, No. 139, § 3, provided: Severability Clause.

"If any provision of this act or the application of this act to any person or circumstance is held invalid or unconstitutional, the invalidity or unconstitutionality does not affect other provisions or applications of this act which can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this act are severable."

**Amendments.** The 2009 amendment rewrote the section.

The 2013 amendment rewrote the section.

## CASE NOTES

### ANALYSIS

Constitutionality.  
FOIA Requests.  
Public Access.

### Constitutionality.

In a 42 U.S.C.S. § 1983 case alleging that this section, the Arkansas Methods of Execution Act, violated that Due Process Clause of the Fourteenth Amendment and the Ex Post Facto Clause, two death-row inmates argued that the Arkansas Department of Corrections violated the Food,

Drug and Cosmetic Act (FDCA), 21 U.S.C.S. § 301 et seq., and the Controlled Substances Act (CSA), 21 U.S.C.S. § 801 et seq. Neither the FDCA nor the CSA provided for a private right of action, and the Declaratory Judgment Act did not provide them with private rights of action under the FDCA and the CSA. *Jones v. Hobbs*, 745 F. Supp. 2d 886 (E.D. Ark. 2010).

2009 Ark. Acts 1296, amending this section, applied to all who would be executed after its enactment, and it did not change either the inmate's criminal liability

ity or his sentence; because the Act would not be retroactively applied, it did not violate the *ex post facto* clause, and the trial court had to lift the injunction staying the inmate's execution. *Ark. Dep't of Corr. v. Williams*, 2009 Ark. 523, 357 S.W.3d 867 (2009), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 823 (Dec. 10, 2009), cert. denied, *Williams v. Hobbs*, — U.S. —, 131 S. Ct. 271, 178 L. Ed. 2d 179 (2010).

Prisoners could do no more than speculate that this section, the Arkansas Method of Execution Act, created a significant risk of more painful execution because it granted the Director of the Arkansas Department of Correction the ability to omit anesthesia from the protocol. This was not the significant risk of increased punishment needed for a violation of the *Ex Post Facto* Clause. *Williams v. Hobbs*, 658 F.3d 842 (8th Cir. 2011).

Supreme Court declared the entirety of the Method of Execution Act of 2009 unconstitutional. The legislature abdicated its responsibility and passed to the Department of Correction the unfettered discretion to determine all protocol and procedures, most notably the chemicals to be used, for a state execution. *Hobbs v. Jones*, 2012 Ark. 293, — S.W.3d — (2012).

#### **FOIA Requests.**

The plain language of subdivision (a)(5)(B) of this section defeated death-row prisoners' argument that it prohibited disclosure of the quantity, method, and order of administration of the chemicals because it expressly indicated that such information will be available through a request under the Arkansas Freedom Of Information Act of 1967 (FOIA), § 25-19-101 et seq. *Williams v. Hobbs*, 658 F.3d 842 (8th Cir. 2011).

#### **Public Access.**

Mere fact that § 16-90-502(d)(2) requires that between six to twelve respectable citizens be present at an execution to verify that the execution was conducted in

compliance with subdivision (a)(1) of this section does not transform executions, which § 16-90-502(d)(1) states are private, into a public proceeding comparable to a criminal trial. Because Arkansas does not have an enduring tradition of public executions, the mere fact that full public access to executions could play a significant role in the proper functioning of capital punishment and could better inform the public debate about execution by lethal injection is not a sufficient basis for reading a right of public access to executions into U.S. Const., Amend. I. *Arkansas Times, Inc. v. Norris*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 3500 (E.D. Ark. Jan. 7, 2008).

42 U.S.C.S. § 1983 suit challenging the Arkansas Department of Correction's (ADC) lethal injection procedures was dismissed under Fed. R. Civ. P. 12(b)(6): (1) in the suit, a newspaper publisher, a newspaper editor, and a journalists' society challenged the ADC's legal injection procedures, claiming that the procedures violated their U.S. Const., Amend. I rights because those procedures did not open up the entire execution process to public view; (2) § 16-90-502(d)(1) made clear that executions were private, and not public, proceedings; (3) the U.S. Supreme Court had not recognized a First Amendment right of access to executions and had held that neither the public nor the media had a U.S. Const., Amends. I, XIV, right to access private areas of prisons; and (4) the fact that subdivision (a)(1) of this section required the presence of witnesses to verify that executions were conducted in compliance with subdivision (a)(1) of this section did not transform executions into public proceedings or render them comparable to criminal trials, in which full public access was constitutionally required. *Arkansas Times, Inc. v. Norris*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 3500 (E.D. Ark. Jan. 7, 2008).

**Cited:** *Thessing v. State*, 365 Ark. 384, 230 S.W.3d 526 (2006).

### **5-4-618. Mental retardation.**

#### **RESEARCH REFERENCES**

**Ark. L. Rev. Article**, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.



## CASE NOTES

## ANALYSIS

**Applicability.****Determinative Factors.****Rebuttable Presumption.****Applicability.**

Whether defendant was mentally retarded was a question of fact for the jury to decide in the sentencing phase of his trial where the trial court found the evidence to be inconsistent, based on the records and two mental evaluations, including evidence suggesting that defendant was malingering. *Weston v. State*, 366 Ark. 265, 234 S.W.3d 848 (2006).

State inmate was entitled to an evidentiary hearing on a federal habeas claim that the inmate's Arkansas death sentence violated the Eighth Amendment because of the inmate's mental retardation. The inmate's failure to present a mental retardation defense at trial pursuant to this section did not preclude the separate and previously unavailable federal claim. *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007), rehearing denied, 499 F.3d 874 (8th Cir. 2007), cert. denied, 552 U.S. 1224, 128 S. Ct. 1226, 170 L. Ed. 2d 140 (2008).

Where habeas petitioner, sentenced to death for murder, argued for the first time in his petition that he was mentally retarded and thus ineligible for the death penalty, and asserted that his failure to previously raise the issue was excused because such a claim was not available until a post-conviction decision by the U.S. Supreme Court barred the death penalty for the mentally retarded, the claim was rejected because the petitioner could have invoked the procedure available under this section. *Jackson v. Norris*, 468 F. Supp.2d 1030 (E.D. Ark. 2007), vacated, 2007 U.S. App. LEXIS 27006 (8th Cir. Ark. 2007).

**Determinative Factors.**

Term "adaptive behavior" under subdivision (a)(1)(B) of this section encompasses the same skill areas as adaptive functioning, but there is no age requirement on the evidence used to establish limitations in adaptive behavior. *Jackson v. Norris*, 615 F.3d 959 (8th Cir. 2010).

Prisoner was entitled to a hearing on a claim that carrying out the death penalty

would violate the Eighth Amendment because the prisoner was mentally retarded. Fact issues existed as to whether the prisoner was mentally retarded under the definition set forth in subsection (a) of this section; tests administered prior to the prisoner's 18th birthday allegedly indicated an IQ of 70, and the prisoner offered evidence of a deficit in adaptive functioning prior to age 18 and a deficit in adaptive behavior with no age limit. *Jackson v. Norris*, 615 F.3d 959 (8th Cir. 2010).

Evidence supported trial court's finding that defendant was not mentally retarded, despite the fact that he had been in special education classes since elementary school, because experts testified that he had an intelligence quotient within the range of 71 to 84, low average, that he had been employed, and that while incarcerated he kept up with financial transactions, wrote letters, and held telephone conversations. *Miller v. State*, 2010 Ark. 1, 362 S.W.3d 264 (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 95 (Feb. 12, 2010).

Denial of appellant's, an inmate's, petition for postconviction relief was appropriate because he alleged only bare conclusions and had not overcome the presumption of trial counsel's competence by identifying specific acts and omissions that could not have been the result of reasonable professional judgment. Counsel's testimony established that, because the inmate's IQ fell at the pivotal point of 65, that was a strategic decision not to pursue further the issue of the inmate's IQ and mental retardation. *Anderson v. State*, 2011 Ark. 488, 385 S.W.3d 783 (2011).

**Rebuttable Presumption.**

Appellate court rejected inmate's motion to recall the mandate in his appeal and reopen his case as inmate never raised a claim of mental retardation until his federal habeas corpus petition, which was filed 10 years after his petition for post-conviction relief, and did not meet the presumption of retardation in subdivision (2) of this section as the inmate had an IQ of 94, which was far above the IQ of 65 that entitled a person to a presumption. *Coulter v. State*, 365 Ark. 262, 227 S.W.3d 904 (2006), cert. denied, *Coulter v.*

Arkansas, 549 U.S. 858, 127 S. Ct. 138,  
166 L. Ed. 2d 101 (2006).

**Cited:** Dimas-Martinez v. State, 2011  
Ark. 515, 385 S.W.3d 238 (2011).

## SUBCHAPTER 7 — ENHANCED PENALTIES FOR CERTAIN OFFENSES

### SECTION.

5-4-701. Definitions.

5-4-702. Enhanced penalties for offenses  
committed in presence of a  
child.

### 5-4-701. Definitions.

As used in this subchapter:

(1) “Child” means a person under sixteen (16) years of age; and

(2) “In the presence of a child” means in the physical presence of a child or knowing or having reason to know that a child is present and may see or hear an act.

**History.** Acts 2001, No. 1707, § 1;  
2005, No. 1994, § 290; 2009, No. 33, § 1;  
2011, No. 1120, § 5.

**Amendments.** The 2009 amendment  
inserted “aggravated cruelty to a dog, cat,  
or horse” in (2) and made a related  
change.

The 2011 amendment deleted “of as-  
sault, battery, domestic battering, aggra-  
vated cruelty to a dog, cat, or horse, or  
assault on a family member or household  
member” following “may see or hear an  
act” in (2).

### 5-4-702. Enhanced penalties for offenses committed in presence of a child.

(a) Any person who commits a felony offense involving homicide, §§ 5-10-101 — 5-10-103, assault or battery, § 5-13-201 et seq., or domestic battering or assault on a family member or household member, §§ 5-26-303 — 5-26-309, may be subject to an enhanced sentence of an additional term of imprisonment of not less than one (1) year and not greater than ten (10) years if the offense is committed in the presence of a child.

(b) Any person who commits the offense of aggravated cruelty to a dog, cat, or horse under § 5-62-104 may be subject to an enhanced sentence of an additional term of imprisonment not to exceed five (5) years if the offense is committed in the presence of a child.

(c)(1) To seek an enhanced penalty established in this section, a prosecuting attorney shall notify the defendant in writing that the defendant is subject to the enhanced penalty.

(2) If the defendant is charged by information or indictment, the prosecuting attorney may include the written notice in the information or indictment.

(d) The enhanced portion of the sentence is consecutive to any other sentence imposed.

(e) Any person convicted under this section is not eligible for early release on parole or community correction transfer for the enhanced portion of the sentence.



**History.** Acts 2001, No. 1707, § 2; 2007, No. 1047, § 1; 2009, No. 33, § 1; 2009, No. 936, § 1.

**Amendments.** The 2009 amendment by No. 33, in (a), updated an internal reference and made a minor stylistic change; inserted (b); and redesignated the remaining subsections accordingly.

The 2009 amendment by No. 936, in (a), inserted “homicide, § 5-10-101 — § 5-10-103,” inserted “§ 5-13-201 et seq., or,” substituted “§ 5-26-303 — 5-26-309” for “as provided in § 5-13-201 et seq., or § 5-26-303 — 5-26-311,” and made related changes.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Annual Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

CASE NOTES

ANALYSIS

Construction.  
Evidence.

Construction.

Use of the word “may” does not mean that a jury has the discretion as to whether to impose an enhanced sentence where a crime of domestic violence was committed in the presence of a child, rather, it means the state had the option of seeking the enhancement; thus, where no sentence was imposed by the jury, a

trial court did not err by imposing one under § 16-90-107(a). Sullivan v. State, 366 Ark. 183, 234 S.W.3d 285 (2006).

Evidence.

Evidence was sufficient to convict defendant of committing aggravated assault and terroristic threatening in the presence of a child, his infant son; in her 911 call, defendant’s wife stated that defendant choked her, she could not breathe, and he threatened to kill her, all in the presence of their child. Mathis v. State, 2012 Ark. App. 285, — S.W.3d — (2012).

SUBCHAPTER 8 — SENTENCING ALTERNATIVE — COMMUNITY SERVICE WORK

SECTION.

- 5-4-801. Definitions.
- 5-4-802. Rules.
- 5-4-803. Procedure.

SECTION.

- 5-4-804. Medical treatment and costs.
- 5-4-805. Reimbursement for housing eligible offenders.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “Legislative intent. The intent of this act is to implement compre-

hensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs.”

5-4-801. Definitions.

As used in this subchapter:

(1) “Community work project” means any program in which an eligible offender in a county jail is allowed to work under the supervision of a government entity on projects on public lands, public buildings, public roads, public parks, and public rights-of-way designed to benefit the government entity supervising the eligible offender;

(2) “Eligible offender” means any person convicted of a misdemeanor offense or felony offense other than:

- (A) Capital murder, § 5-10-101;
- (B) Murder in the first degree, § 5-10-102;
- (C) Murder in the second degree, § 5-10-103;
- (D) Manslaughter, § 5-10-104;
- (E) Rape, § 5-14-103;
- (F) Kidnapping, § 5-11-102;
- (G) Aggravated robbery, § 5-12-103;
- (H) Driving while intoxicated, second or subsequent offense, § 5-65-103;
- (I) Negligent homicide, § 5-10-105;
- (J) Trafficking a controlled substance, § 5-64-440;
- (K) Any felony involving violence as listed under § 5-4-501(d)(2);

or

(L) Any offense requiring registration under the Sex Offender Registration Act of 1997, § 12-12-901 et seq.; and

(3) “Work incentive credit” means a sentence credit of up to three (3) days as designated by the court toward completion of an eligible offender’s sentence for each day the eligible offender works on a community work project.

**History.** Acts 2011, No. 570, § 21.

### **5-4-802. Rules.**

The Board of Corrections shall promulgate necessary rules to be followed by a government entity in the supervision of eligible offenders sentenced under this subchapter.

**History.** Acts 2011, No. 570, § 21; substituted “sentenced” for “utilized” in 2013, No. 1125, § 2. the introductory language.

**Amendments.** The 2013 amendment

### **5-4-803. Procedure.**

(a) A court may sentence an eligible offender under this subchapter.

(b)(1) If a court elects to sentence an eligible offender under this subchapter, the court may suspend imposition of sentence for the eligible offender for a period not to exceed the period of years that is the maximum penalty for the offense for which convicted upon condition that the eligible offender be incarcerated in a county jail or regional jail to participate in a community work project.

(2) In order for the eligible offender to participate in a community work project, space must be available in the county jail or regional jail as certified by the county sheriff to the:

(A) Department of Correction for an eligible offender committed to the department; or

(B) Court for an eligible offender serving time for a misdemeanor offense.



(3) The length of the community work project service and incarceration shall not exceed eighteen (18) months for a felony offense with work incentive credit or, in the case of a misdemeanor offense, the maximum length of incarceration for the misdemeanor offense reduced by the work incentive credit.

(c)(1) If an eligible offender sentenced under this subchapter withdraws consent to participate in a community work project, then:

(A) The county sheriff shall notify the court and bring the eligible offender before the court within a reasonable time; and

(B) The court shall determine whether the eligible offender has withdrawn consent to participate in a community work project.

(2) If the court finds that the eligible offender has withdrawn consent to participate in the community work project, the court shall remand the eligible offender for the remaining portion of the eligible offender's sentence to the:

(A) Department of Correction for a felony offense; or

(B) County sheriff for a misdemeanor offense.

(3) If an eligible offender withdraws consent to participate in a community work project, the eligible offender is entitled to all good time and parole eligibility considerations as provided by law.

(4) Any portion of the sentence that was suspended by the court at the time of the original sentence is not affected by the removal of an eligible offender from participating in the community work project.

(d)(1) If an eligible offender's conduct while participating in a community work project is unsatisfactory, upon petition filed by the prosecuting attorney, the court may schedule a hearing to determine if the eligible offender should be allowed to continue to participate in the community work project.

(2) A hearing under this subsection shall follow the same format and accord the eligible offender the same safeguards as the revocation procedure in § 16-93-307.

(3) The burden of proof necessary for revocation of a sentence under this subchapter shall be a preponderance of the evidence that the eligible offender's conduct has been unsatisfactory while participating in a community work project.

(4) If the court finds that the eligible offender's conduct has been unsatisfactory while performing in a community work project, the court shall remand the eligible offender for the remaining portion of the eligible offender's sentence to the:

(A) Department of Correction for a felony offense; or

(B) County sheriff for a misdemeanor offense.

(5) If an eligible offender's conduct is found to be unsatisfactory, the eligible offender is entitled to all good time and parole eligibility considerations as provided by law.

**History.** Acts 2011, No. 570, § 21; subdivided part of (b)(2) into (b)(2)(A) and 2013, No. 1125, § 3. (b)(2)(B); and inserted "Court" in present

**Amendments.** The 2013 amendment (b)(2)(B).

**5-4-804. Medical treatment and costs.**

The state is responsible for the cost of medical treatment approved by the Department of Correction of an eligible offender sentenced to a felony under this subchapter if the medical treatment is for:

(1) The result of an injury sustained on the work site of the community work project or during transportation to and from the work site by a government entity; or

(2)(A) The result of illness or an injury sustained by an eligible offender committed to the county jail or regional jail and who is assigned to a community work project.

(B) The Department of Correction may transfer an eligible offender committed to a county jail or regional jail under this subchapter to a medical facility or treatment facility, including a facility of the Department of Correction, it deems appropriate for the medical treatment.

(3) Nothing in this section precludes the Department of Correction from seeking reimbursement or damages from a person or entity that contributes to or causes the injury or illness referred to in this section.

**History.** Acts 2011, No. 570, § 21.

**5-4-805. Reimbursement for housing eligible offenders.**

The state shall reimburse a county for housing an eligible offender convicted of a felony offense and sentenced under this subchapter at a rate to be determined by the Board of Corrections.

**History.** Acts 2011, No. 570, § 21.

**SUBCHAPTER 9 — SENTENCING ALTERNATIVE — PRE-ADJUDICATION  
PROBATION****SECTION.**

5-4-901. Legislative intent.

5-4-902. Definitions.

5-4-903. Program authorized.

5-4-904. Eligibility.

5-4-905. Sanctions.

5-4-906. Record expungement upon completion.

5-4-907. Cost, fees, and restitution.

**SECTION.**

5-4-908. Program operation.

5-4-909. Administrative Office of the Courts.

5-4-910. Disposition of court costs and user fees.

5-4-911. Required resources.

5-4-912. Collection of data — Reporting requirement.

**5-4-901. Legislative intent.**

The intent of this act is to provide the judiciary with an additional alternative to the disposition of criminal offenders that would assist the offender in atoning for his or her criminal transgression and promote the enforcement of the state's criminal statutes while easing the inmate burden on the county jails and the Department of Correction.

**History.** Acts 2013, No. 1340, § 1.



**5-4-902. Definitions.**

As used in this subchapter, “pre-adjudication” means the period of time after:

- (1) The prosecuting attorney files a criminal information or an indictment is filed in circuit court;
- (2) The person named in the criminal information or indictment is arraigned on the charge in circuit court; and
- (3) The person enters the program without a guilty plea or the person enters a plea of guilty but before the circuit court enters a judgment and pronounces a sentence against the person.

**History.** Acts 2013, No. 1340, § 1.

**5-4-903. Program authorized.**

(a)(1) Each judicial district of this state may establish a pre-adjudication probation program under this subchapter.

(2) The structure, method, and operation of the pre-adjudication probation program may differ and shall be based upon the specific needs of and resources available to the judicial district where the pre-adjudication probation program is located.

(b)(1) A pre-adjudication probation program may incorporate services from various state agencies, including without limitation the Department of Community Correction and the Department of Human Services.

(2) Participating state agencies may provide:

(A) Persons to serve as pre-adjudication probation officers, drug counselors, or other support staff;

(B) Drug testing and other substance-abuse facilities;

(C) Intensive short-term and long-term residential treatment for participants in the pre-adjudication probation program who have demonstrated a need for substance abuse treatment or other mental health-related treatment; and

(D) Other personnel, support staff, or facilities that the circuit court administering the pre-adjudication probation program finds necessary or helpful.

(c) Subject to an appropriation, funding, and position authorization, both programmatic and administrative, the Administrative Office of the Courts shall:

(1) Provide state-level coordination and support for circuit courts administering the pre-adjudication probation program;

(2) Administer funds for the maintenance and operation of local pre-adjudication probation programs;

(3) Provide training and education to judges and other professionals involved in pre-adjudication probation programs; and

(4) Operate as a liaison between judges and other state-level agencies providing services to pre-adjudication probation programs.

**History.** Acts 2013, No. 1340, § 1.

#### **5-4-904. Eligibility.**

(a) The judicial district in which a person is charged with a felony shall have in place a pre-adjudication probation program as authorized by this subchapter before this subchapter may be utilized by the person charged with the felony, the circuit court with jurisdiction, or the state.

(b) A person charged with a felony is eligible to participate in a pre-adjudication probation program if:

(1) The circuit court with jurisdiction over the case and the prosecuting attorney agree; and

(2) The person is not charged with one (1) of the following criminal offenses:

(A) A criminal offense for which the person would be required to register as a sex offender under the Sex Offender Registration Act of 1997, § 12-12-901 et seq.;

(B) A felony involving violence as listed in § 5-4-501(d)(2);

(C) A felony involving a victim who was seventeen (17) years of age or younger at the time the felony was committed; or

(D) A felony involving a victim who was sixty-five (65) years of age or older at the time the felony was committed.

(c)(1) A person charged with a traffic offense committed in any type of motor vehicle who was a holder of a commercial learner's permit or commercial driver license at the time the traffic offense was committed is ineligible to participate in a pre-adjudication probation program.

(2) As used in subdivision (c)(1) of this section, "traffic offense" does not include a parking violation, motor vehicle weight violation, or motor vehicle defect violation.

**History.** Acts 2013, No. 1340, § 1.

#### **5-4-905. Sanctions.**

(a)(1) A pre-adjudication probation program judge may impose sanctions on a pre-adjudication probation program participant who fails to complete certain court-ordered pre-adjudication program requirements or meet certain court-ordered pre-adjudication program goals.

(2) Sanctions may include without limitation:

(A) Time spent in the custody of the county sheriff;

(B) Additional fines;

(C) Community service;

(D) Substance abuse testing;

(E) Written assignments; and

(F) Volunteer work for a nonprofit organization.

(b) The imposition of an additional sanction under this section:

(1) Is not an execution of a sentence resulting from a conviction for the criminal offense for which the participant has entered the pre-adjudication probation program; and



(2) Does not result by itself in the expulsion of the pre-adjudication probation program participant from the pre-adjudication probation program.

**History.** Acts 2013, No. 1340, § 1.

#### **5-4-906. Record expungement upon completion.**

(a) A pre-adjudication probation program judge, on his or her own motion or upon a request from the participant in the pre-adjudication probation program, shall order expungement and dismissal of a case if:

(1) The participant in the pre-adjudication probation program has successfully completed a pre-adjudication probation program, as determined by the pre-adjudication probation program judge;

(2) The pre-adjudication probation program judge has received a recommendation from the prosecuting attorney for expungement and dismissal of the case; and

(3) The pre-adjudication probation program judge, after considering the past criminal history of the participant in the pre-adjudication probation program, determines that expungement and dismissal of the case is appropriate.

(b) Unless otherwise ordered by the pre-adjudication probation program court, expungement under this section shall be as described in § 16-90-901 et seq. [repealed].

**History.** Acts 2013, No. 1340, § 1.

**A.C.R.C. Notes.** Effective January 1, 2014, Acts 2013, No. 1460, § 7, repealed § 16-90-901 et seq. referenced in subsection (b) of this section. For the law effective

January 1, 2014, on the expungement and sealing of criminal records, see the Comprehensive Criminal Record Sealing Act of 2013, § 16-90-1401 et seq.

#### **5-4-907. Cost, fees, and restitution.**

(a) The pre-adjudication probation program judge may order the offender to pay:

(1) Court costs as provided in § 16-10-305;

(2) Any substance abuse treatment costs;

(3) Drug testing costs;

(4) Costs associated with mental health treatment;

(5) A pre-adjudication probation program user fee;

(6) Any restitution owed the victim of the charged criminal offense;

(7) Necessary supervision fees;

(8) Any applicable residential treatment fees; and

(9) Any fees determined or authorized under § 12-27-125(b)(17)(B) or § 16-93-104(a)(1), which are to be paid to the Department of Community Correction.

(b)(1) The pre-adjudication probation program judge shall establish a schedule for the payment of costs, fees, and restitution.

(2) The cost for substance abuse treatment, mental health treatment, drug testing, and supervision shall be set by the treatment and

supervision providers respectively and made part of the order of the pre-adjudication probation program judge for payment.

(3) Pre-adjudication probation program user fees shall be set by the pre-adjudication probation program judge.

(4) Treatment, drug testing, and supervision costs or fees shall be paid to the respective providers.

(5) Fees determined or authorized under § 12-27-125(b)(17)(B) or § 16-93-104(a)(1) shall be paid to the Department of Community Correction.

(6) Restitution to the victim shall be paid directly to the victim.

(c) Court orders for costs, fees, and restitution shall remain an obligation of the participant in the pre-adjudication probation program with court monitoring until fully paid.

**History.** Acts 2013, No. 1340, § 1.

#### **5-4-908. Program operation.**

(a)(1) A pre-adjudication probation program may require a separate judicial processing system differing in practice and design from the traditional adversarial criminal prosecution and trial systems.

(2) A pre-adjudication probation program team shall be designated by a circuit judge assigned to manage the pre-adjudication probation program docket and may include a circuit judge, a prosecuting attorney, a public defender or private defense attorney, one (1) or more probation officers, and any other individual or individuals determined necessary by the pre-adjudication probation program judge.

(3)(A) The administrative judge of the judicial district shall designate one (1) or more circuit judges to administer the pre-adjudication probation program.

(B) If a county is in a judicial district that does not have a circuit judge who is able to administer the pre-adjudication probation program on a consistent basis, the administrative plan for the judicial circuit required by Administrative Order No. 14 of the Supreme Court may designate a state district court judge to administer the pre-adjudication probation program.

(b) Each judicial district may develop a training and implementation manual for a pre-adjudication probation program with the assistance of the:

- (1) Department of Human Services;
- (2) Department of Education;
- (3) Department of Career Education;
- (4) Department of Community Correction; and
- (5) Administrative Office of the Courts.

**History.** Acts 2013, No. 1340, § 1.



**5-4-909. Administrative Office of the Courts.**

The Administrative Office of the Courts shall:

- (1) Serve as a coordinator between pre-adjudication probation program judges, the Department of Community Correction, and other parties;
- (2) Establish, manage, and maintain a uniform statewide pre-adjudication probation program information system to track information and data on pre-adjudication probation program participants;
- (3) Train and educate pre-adjudication probation program judges and pre-adjudication probation program staff in those judicial districts maintaining a pre-adjudication probation program;
- (4) Oversee the disbursement of funds appropriated to the Administrative Office of the Courts for the maintenance and operation of local pre-adjudication probation programs based on a formula developed by the office; and
- (5) Develop guidelines to serve as a framework for developing effective local pre-adjudication probation programs and to provide a structure for conducting research and evaluation for pre-adjudication probation program accountability.

**History.** Acts 2013, No. 1340, § 1.

**5-4-910. Disposition of court costs and user fees.**

(a) All court costs and pre-adjudication probation program user fees assessed by the pre-adjudication probation program judge shall be paid to the circuit court clerk for remittance to the county treasury under § 14-14-1313.

(b) The county treasurer shall credit all court costs received under this section to the county administration of justice fund to be distributed under § 16-10-307.

(c) The county treasurer shall credit all pre-adjudication probation program user fees received under this section to a fund known as the county pre-adjudication probation program fund and appropriated by the quorum court for the benefit and administration of the pre-adjudication probation program.

**History.** Acts 2013, No. 1340, § 1.

**5-4-911. Required resources.**

Each pre-adjudication probation program established under this subchapter, subject to an appropriation, funding, and position authorization, both programmatic and administrative, shall be provided with the following resources:

(1) The Department of Community Correction shall provide the following pursuant to § 5-4-903 for adult offenders:

- (A) A minimum of one (1) counselor position for every thirty (30) pre-adjudication probation program participants;

(B) A minimum of one (1) probation officer position for every forty (40) pre-adjudication probation program participants;

(C) A minimum of one (1) administrative assistant position for each pre-adjudication probation program; and

(D) Drug screens and testing as needed.

(2) The Administrative Office of the Courts shall:

(A) Provide funding for additional ongoing maintenance and operation costs of local pre-adjudication probation programs not provided by the Department of Community Correction or the Department of Human Services, including without limitation local pre-adjudication probation program supplies, education, travel, and related expenses;

(B) Provide direct support to the pre-adjudication probation program judge and pre-adjudication probation program;

(C) Provide coordination between the multidisciplinary team and the pre-adjudication probation program judge;

(D) Provide case management;

(E) Monitor compliance of pre-adjudication probation program participants with pre-adjudication probation program requirements; and

(F) Provide pre-adjudication probation program evaluation and accountability.

**History.** Acts 2013, No. 1340, § 1.

#### **5-4-912. Collection of data — Reporting requirement.**

(a)(1) A pre-adjudication probation program shall collect and provide data on pre-adjudication probation program applicants and all participants as required by the Administrative Office of the Courts.

(2) Data collected under subdivision (a)(1) of this section shall include:

(A) The total number of applicants;

(B) The total number of participants;

(C) The total number of successful applicants;

(D) The total number of successful participants;

(E) The reason why each unsuccessful participant did not complete the pre-adjudication probation program;

(F) Information about what happened to each unsuccessful participant;

(G) The total number of participants who were arrested for a new criminal offense while in the pre-adjudication probation program;

(H) The total number of participants who were convicted of a new criminal offense while in the pre-adjudication probation program;

(I) The total number of participants who committed a violation of one (1) or more conditions of the pre-adjudication probation program and the resulting sanction;

(J) The results of the initial risk-needs assessment review for each participant;



(K) The race and gender of each applicant;

(L) The race and gender of each participant;

(M) The race and gender of each victim of an offense committed by the applicant;

(N) The race and gender of each victim of an offense committed by the participant; and

(O) Any other data or information as required by the Administrative Office of the Courts.

(b) The data collected for evaluation purposes under subsection (a) of this section shall:

(1) Include a minimum standard data set developed and specified by the Administrative Office of the Courts; and

(2) Be maintained in the court files or be otherwise accessible by the courts and the Administrative Office of the Courts.

(c)(1) After an individual is discharged either upon completion or termination of a pre-adjudication probation program, the pre-adjudication probation program as far as is practicable shall conduct follow-up contacts with and reviews of former pre-adjudication probation program participants for key outcome indicators of drug use, recidivism, and employment.

(2)(A) The follow-up contacts with and reviews of former pre-adjudication probation program participants shall be conducted as frequently and for a period of time as determined by the Administrative Office of the Courts based upon the nature of the pre-adjudication probation program and the nature of the participants.

(B) The follow-up contacts with and reviews of former pre-adjudication probation program participants are not extensions of the pre-adjudication probation program court's jurisdiction over the pre-adjudication probation program participants.

(d) For purposes of standardized measurement of success of pre-adjudication probation programs across the state, the Administrative Office of the Courts in consultation with other state agencies shall adopt an operational definition of terms to be used in any evaluation and report of pre-adjudication probation programs such as:

(1) "Incentives given";

(2) "Recidivism";

(3) "Retention";

(4) "Relapses";

(5) "Restarts"; and

(6) "Sanctions imposed".

(e) Each pre-adjudication probation program shall provide all information requested by the Administrative Office of the Courts.

(f) The Administrative Office of the Courts, the Department of Community Correction, the Office of Alcohol and Drug Abuse Prevention, and the Arkansas Crime Information Center shall work together to share and make available data to provide a comprehensive data management system for the state's pre-adjudication probation programs.

(g)(1) The Administrative Office of the Courts shall:

(A) Develop a statewide evaluation model for pre-adjudication probation programs; and

(B) Conduct ongoing evaluations of the effectiveness and efficiency of all pre-adjudication probation programs.

(2) The Administrative Office of the Courts shall submit to the General Assembly by July 1 of each year a report of the evaluations under subdivision (g)(1) of this section

**History.** Acts 2013, No. 1340, § 1.

1030, § 1, which enacted § 5-4-101(4) and

**A.C.R.C. Notes.** Subsection (d) of this section may be affected by Acts 2013, No.

established a definition of “recidivism” for purposes of this chapter.

## CHAPTER 5

# DISPOSITION OF CONTRABAND AND SEIZED PROPERTY

### SUBCHAPTER.

1. GENERAL PROVISIONS.

2. FORFEITURE OF CONVEYANCES USED IN COMMISSION OF CERTAIN CRIMES.

4. FORFEITURE OF WEAPONS AND AMMUNITION.

## SUBCHAPTER 1 — GENERAL PROVISIONS

### SECTION.

5-5-101. Disposition of contraband and seized property.

### 5-5-101. Disposition of contraband and seized property.

(a) Any seized property shall be returned to the rightful owner or possessor of the seized property except contraband owned by a defendant.

(b)(1) As used in this section, “contraband” means any:

(A) Article possessed under a circumstance prohibited by law;

(B) Weapon or other instrument used in the commission or attempted commission of a felony;

(C) Visual, print, or electronic medium that depicts sexually explicit conduct involving a child prohibited under § 5-27-304;

(D) Visual, print, or electronic medium that contains a sexual performance of a child prohibited under § 5-27-403;

(E) Item the possession of which is prohibited by § 5-27-602;

(F) Item the production of which is prohibited by § 5-27-603;

(G) Item the production of which is prohibited by § 5-27-605; or

(H) Other article designated “contraband” by law.

(2) “Contraband” does not include a visual, a print, or an electronic medium created, obtained, or possessed by licensed medical personnel or a regulated medical facility for the purpose of treatment or documentation of injuries to a child.

(c)(1) Contraband shall be destroyed.



(2) Except as limited under subdivision (c)(3) of this section, in the discretion of the court having jurisdiction, any contraband capable of lawful use may be:

(A) Retained for use by the law enforcement agency responsible for the arrest; or

(B) Sold and the proceeds disposed of in the manner provided by subsections (e)-(g) of this section.

(3) Contraband described in subdivisions (b)(1)(C)-(H) of this section and having no lawful use shall not be retained.

(d)(1)(A) Except as provided in subdivision (d)(2) of this section, unclaimed seized property shall be sold at public auction to be held by the chief law enforcement officer of the county, city, or town law enforcement agency that seized the unclaimed seized property or the chief law enforcement officer's designee.

(B) The proceeds of the sale, less the cost of the sale and any storage charge incurred in preserving the unclaimed seized property, shall be paid into the general fund of the county, city, or town whose law enforcement agency performed the seizure.

(2)(A) Unclaimed seized property that is a recreational item may be donated at no cost to a local or state agency, a nonprofit organization, or an educational program designed to provide education, assistance, or recreation to children.

(B)(i) As used in subdivision (d)(2)(A) of this section, "recreational item" means an item generally used for children's activities and play.

(ii) "Recreational item" includes without limitation a bicycle but does not include a motor vehicle or motorcycle.

(e) The time and place of sale of seized property shall be advertised:

(1) For at least fourteen (14) days next before the day of sale by posting written notice at the courthouse door; and

(2) By publication in the form of at least two (2) insertions, at least three (3) days apart, before the day of sale in a weekly or daily newspaper published or customarily distributed in the county.

(f)(1) Any seized property to be sold at public sale shall be offered for sale on the day for which it was advertised between 9:00 a.m. and 3:00 p.m., publicly, by auction, and for ready money.

(2) The highest bidder shall be the purchaser.

(g)(1) The proceeds from any sale of seized property shall be delivered to the county, city, or town treasurer, as the case may be, to be held by him or her in a separate account for a period of three (3) months.

(2) If any person during the time described in subdivision (g)(1) of this section establishes to the satisfaction of the county, city, or town treasurer that he or she was at the time of sale the owner of any seized property sold as provided in subsection (f) of this section, the person shall be paid the amount realized from sale of the seized property less the expenses of the sale.

(3) Any money in the separate account not claimed or paid within the designated three-month period shall be paid into the general fund of the county, city, or town whose law enforcement agency performed the seizure.

**History.** Acts 1975, No. 280, § 1401; 1977, No. 360, § 4; A.S.A. 1947, § 41-1401; Acts 1991, No. 1030, § 1; 2003, No. 135, § 1; 2007, No. 703, §§ 1, 2; 2009, No. 748, § 5; 2011, No. 171, § 1.

**Amendments.** The 2009 amendment redesignated (b)(1) through (b)(8) as (b)(1)(A) through (b)(1)(H), redesignated

the exception in (b)(1)(H) as present (b)(2), and made related and minor stylistic changes.

The 2011 amendment redesignated (d)(1) as (d)(1)(A) and (d)(2) as (d)(1)(B); inserted "Except as provided in subdivision (d)(2) of this section" in (d)(1)(A); and added present (d)(2).

## SUBCHAPTER 2 — FORFEITURE OF CONVEYANCES USED IN COMMISSION OF CERTAIN CRIMES

### SECTION.

5-5-201. Forfeiture requirement — Exceptions.

5-5-202. Seizure of conveyances.

### SECTION.

5-5-204. Use or sale of conveyances — Disposition of sale proceeds.

### 5-5-201. Forfeiture requirement — Exceptions.

(a) Upon conviction, any conveyance, including an aircraft, motor vehicle, or vessel is subject to forfeiture under this subchapter if it is used in the commission or attempt of:

- (1) A burglary;
  - (2) A robbery;
  - (3) A theft;
  - (4) An arson; or
  - (5) Trafficking of persons, § 5-18-103.
- (b) However:

(1) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this subchapter unless it appears that the owner or other person in charge of the conveyance was a consenting party or privy to the commission or attempt to commit the offense;

(2) No conveyance is subject to forfeiture under this subchapter by reason of any act or omission established by the owner of the conveyance to have been committed or omitted without his or her knowledge or consent and without the knowledge or consent of any person having possession, care, or control of the conveyance with the owner's permission; and

(3) A forfeiture of a conveyance encumbered by a security interest is subject to the security interest of the secured party if the secured party neither had knowledge of nor consented to the use of the conveyance in the commission or attempt to commit the offense.

(c)(1) An all-terrain vehicle used in the commission of a second or subsequent offense for criminal trespass, § 5-39-203, that occurs within five (5) years of a prior offense of criminal trespass, § 5-39-203, is subject to seizure and forfeiture under this subchapter.

(2) As used in this subsection, "all-terrain vehicle" means the same as defined in § 27-21-102.



**History.** Acts 1985, No. 238, § 1; A.S.A. The 2013 amendment by No. 1363 1947, § 41-1403; Acts 2013, No. 1157, § 2; added (c). 2013, No. 1363, § 1.

**Amendments.** The 2013 amendment by No. 1157 rewrote (a).

### **5-5-202. Seizure of conveyances.**

(a) A conveyance subject to forfeiture under this subchapter may be seized by any law enforcement agent upon process issued by any circuit court having jurisdiction over the conveyance upon a petition filed by the prosecuting attorney of the judicial district.

(b) Seizure without process may be made if:

(1) The seizure is incident to an arrest or a search under a search warrant; or

(2) Any law enforcement agent has probable cause to believe that the conveyance was used in the commission or attempt of:

(A) A burglary;

(B) A robbery;

(C) A theft;

(D) An arson; or

(E) Trafficking of persons, § 5-18-103.

**History.** Acts 1985, No. 238, § 2; A.S.A. nations; added (E); and inserted “or attempt” in the introductory language of 1947, § 41-1404; Acts 2013, No. 1157, § 3. (b)(2).

**Amendments.** The 2013 amendment, in (b)(2), added the (A) through (D) designations.

### **5-5-204. Use or sale of conveyances — Disposition of sale proceeds.**

(a)(1)(A) Upon conviction and a hearing, when the circuit court having jurisdiction over the conveyance seized finds by a preponderance of the evidence that a ground for a forfeiture exists under this subchapter, the circuit court may enter an order to sell the conveyance.

(B) After allowance for reasonable expenses of seizure and maintenance of custody of the conveyance, the proceeds from a sale under subdivision (a)(1)(A) of this section shall be used to satisfy any outstanding restitution under § 5-4-205 owed to a victim of an offense for which the conveyance was used, if the victim files a petition with the circuit court or makes a request to the circuit court within thirty (30) days of the filing of the judgment and commitment order of the convicted defendant.

(2) If there is not a victim of an offense owed restitution under § 5-4-205, the circuit court shall enter an order to:

(A) Permit the law enforcement agency or the prosecuting attorney for the judicial district in which the conveyance was seized to retain the conveyance for official use; or

(B)(i) Permit the law enforcement agency to sell the conveyance at a public or private sale.

(ii) In the event of a sale, the circuit court shall provide by order that the proceeds be used for payment of any proper expense of the proceeding for forfeiture and sale, including expenses of:

- (a) Investigation;
- (b) Seizure;
- (c) Maintenance of custody;
- (d) Advertising; and
- (e) Court costs.

(b) Any proceeds from the sale of a forfeited conveyance under subdivision (a)(2)(B) of this section, or if there was a victim of an offense owed restitution under § 5-4-205, the proceeds remaining after the satisfaction of the victim's restitution under § 5-4-205 in excess of a proper expense shall be distributed as follows:

(1) Forty percent (40%) to be deposited into the State Treasury as special revenues to the credit of the Department of Arkansas State Police Fund;

(2)(A) Forty percent (40%) to the law enforcement agency that perfected the arrest.

(B) However, if a federal agency perfected the arrest, the forty percent (40%) under subdivision (b)(2)(A) of this section shall be distributed to the county sheriff's office of the county responsible for the prosecution; and

(3) Twenty percent (20%) to the county sheriff's office of the county responsible for the prosecution.

**History.** Acts 1985, No. 238, § 4; A.S.A. 1947, § 41-1406; Acts 2011, No. 866, § 1; 2013, No. 1125, § 4.

**A.C.R.C. Notes.** Acts 2011, No. 866, § 1, as enacted, amended subdivision (a)(1) of this section to read "Upon conviction, ... the circuit court shall may enter an order ...". The intent was to delete "shall" and insert "may".

**Amendments.** The 2011 amendment rewrote present (a)(1); inserted the introductory language of present (a)(2) and redesignated the subdivisions accord-

ingly; and rewrote the introductory language of (b).

The 2013 amendment redesignated and subdivided former (a)(1) as present (a)(1)(A) and (a)(1)(B); in present (a)(1)(A), inserted "and a hearing" and deleted "upon a hearing" following "seized finds" and "with the proceeds, after" following "sell the conveyance"; and in (b)(1)(B), inserted "After" and substituted "of the conveyance, the proceeds from a sale under subdivision (a)(1)(A) of this section shall be used" for "going."

## SUBCHAPTER 4 — FORFEITURE OF WEAPONS AND AMMUNITION

### SECTION.

5-5-401. Definitions.

5-5-402. Transfer to State Crime Laboratory.

### 5-5-401. Definitions.

As used in this subchapter, "weapon" means any firearm, bomb, explosive, metal knuckles, sword, spear, or other device employed as an instrument of crime by subjecting another to physical harm or fear of physical harm.



**History.** Acts 1995, No. 202, § 1; 2007, No. 827, § 17.

### **5-5-402. Transfer to State Crime Laboratory.**

(a)(1) Notwithstanding any other provision of this chapter, a weapon or ammunition seized by any agency of the State of Arkansas or any local law enforcement agency in the state, and that is forfeited pursuant to law, may be transferred to the State Crime Laboratory.

(2) However, no transfer of a weapon or ammunition shall be made pursuant to this section until there is a final determination concerning the disposition of the weapon or ammunition by the court having jurisdiction over the weapon or ammunition.

(b) In addition to a forfeited weapon or ammunition, any other weapon or ammunition held by an agency of the state or a local law enforcement agency for which the agency has no use may be transferred to the laboratory under the procedures prescribed in this subchapter.

(c) Nothing contained in this subchapter shall be construed to preclude a voluntary transfer to the State Crime Laboratory by an individual, entity, or agency of the United States Government.

**History.** Acts 1995, No. 202, § 1; 2007, No. 827, § 18.

## ***SUBTITLE 2. OFFENSES AGAINST THE PERSON***

### **CHAPTER 10**

### **HOMICIDE**

**SECTION.**

5-10-101. Capital murder.

5-10-104. Manslaughter.

**SECTION.**

5-10-105. Negligent homicide.

5-10-106. Physician-assisted suicide.

### **5-10-101. Capital murder.**

(a) A person commits capital murder if:

(1) Acting alone or with one (1) or more other persons:

(A) The person commits or attempts to commit:

(i) Terrorism, as defined in § 5-54-205;

(ii) Rape, § 5-14-103;

(iii) Kidnapping, § 5-11-102;

(iv) Vehicular piracy, § 5-11-105;

(v) Robbery, § 5-12-102;

(vi) Aggravated robbery, § 5-12-103;

(vii) Residential burglary, § 5-39-201(a);

(viii) Commercial burglary, § 5-39-201(b);

(ix) Aggravated residential burglary, § 5-39-204;

(x) A felony violation of the Uniform Controlled Substances Act, §§ 5-64-101 — 5-64-508, involving an actual delivery of a controlled substance; or

(xi) First degree escape, § 5-54-110; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of a person under circumstances manifesting extreme indifference to the value of human life;

(2) Acting alone or with one (1) or more other persons:

(A) The person commits or attempts to commit arson, § 5-38-301; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of any person;

(3) With the premeditated and deliberated purpose of causing the death of any law enforcement officer, jailer, prison official, firefighter, judge or other court official, probation officer, parole officer, any military personnel, or teacher or school employee, when such person is acting in the line of duty, the person causes the death of any person;

(4) With the premeditated and deliberated purpose of causing the death of another person, the person causes the death of any person;

(5) With the premeditated and deliberated purpose of causing the death of the holder of any public office filled by election or appointment or a candidate for public office, the person causes the death of any person;

(6) While incarcerated in the Department of Correction or the Department of Community Correction, the person purposely causes the death of another person after premeditation and deliberation;

(7) Pursuant to an agreement that the person cause the death of another person in return for anything of value, he or she causes the death of any person;

(8) The person enters into an agreement in which a person is to cause the death of another person in return for anything of value, and a person hired pursuant to the agreement causes the death of any person;

(9)(A) Under circumstances manifesting extreme indifference to the value of human life, the person knowingly causes the death of a person fourteen (14) years of age or younger at the time the murder was committed if the defendant was eighteen (18) years of age or older at the time the murder was committed.

(B) It is an affirmative defense to any prosecution under this subdivision (a)(9) arising from the failure of the parent, guardian, or person standing in loco parentis to provide specified medical or surgical treatment, that the parent, guardian, or person standing in loco parentis relied solely on spiritual treatment through prayer in accordance with the tenets and practices of an established church or religious denomination of which he or she is a member; or

(10) The person:

(A) Purposely discharges a firearm from a vehicle at a person or at a vehicle, conveyance, or a residential or commercial occupiable structure that he or she knows or has good reason to believe to be occupied by a person; and



(B) Thereby causes the death of another person under circumstances manifesting extreme indifference to the value of human life.

(b) It is an affirmative defense to any prosecution under subdivision (a)(1) of this section for an offense in which the defendant was not the only participant that the defendant did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid in the homicidal act's commission.

(c)(1) Capital murder is punishable as follows:

(A) If the defendant was eighteen (18) years of age or older at the time he or she committed the capital murder:

(i) Death; or

(ii) Life imprisonment without parole under §§ 5-4-601 — 5-4-605, 5-4-607, and 5-4-608; or

(B) If the defendant was younger than eighteen (18) years of age at the time he or she committed the capital murder:

(i) Life imprisonment without parole as it is defined in § 5-4-606; or

(ii) Life imprisonment with the possibility of parole after serving a minimum of twenty-eight (28) years' imprisonment.

(2) For any purpose other than disposition under §§ 5-4-101 — 5-4-104, 5-4-201 — 5-4-204, 5-4-301 — 5-4-307, 5-4-401 — 5-4-404, 5-4-501 — 5-4-504, 5-4-601 — 5-4-605, 5-4-607, 5-4-608, 16-93-307, 16-93-313, and 16-93-314, capital murder is a Class Y felony.

**History.** Acts 1975, No. 280, § 1501; 1983, No. 341, § 1; 1985, No. 840, § 1; A.S.A. 1947, § 41-1501; Acts 1987, No. 242, § 2; 1989, No. 97, § 1; 1989, No. 856, § 1; 1991, No. 683, § 1; 1993, No. 1189, § 2; 1995, No. 258, § 1; 1995, No. 800, § 1; 2003, No. 1342, § 5; 2007, No. 827, §§ 19, 20; 2009, No. 748, § 6; 2009, No. 1395, § 3; 2011, No. 570, § 22; 2013, No. 1490, § 3.

**A.C.R.C. Notes.** Acts 2009, No. 1395, § 3, and Acts 2009, No. 748, § 6, both added "Aggravated residential burglary, § 5-39-204" to the list of underlying felonies for felony capital murder in subdivision (a)(1)(A) of this section.

Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Acts 2013, No. 1490, § 1, provided: "Legislative intent.

"(a) It is the intent of the General Assembly to revise the punishments authorized for persons who are not yet eighteen (18) years of age when they commit capital murder after the effective date of this act.

"(b) It is not the intent of the General Assembly to authorize the revised punishments for those persons who committed capital murder when they were not yet eighteen (18) years of age prior to the effective date of this act."

**Amendments.** The 2009 amendment by No. 748 inserted present (a)(1)(A)(ix).

The 2009 amendment by No. 1395 inserted present (a)(1)(A)(ix) and redesignated the remaining subdivisions accordingly; and made a minor stylistic change in (a)(1)(B).

The 2011 amendment, in (c)(2), substituted "5-4-307" for "5-4-308, 5-4-310, 5-4-311" and inserted "16-93-307, 16-93-313, and 16-93-314."

The 2013 amendment rewrote (c).

## RESEARCH REFERENCES

**ALR.** Sufficiency of Evidence to Support Homicide Conviction Where No Body Was Produced. 65 A.L.R.6th 359.

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

## CASE NOTES

## ANALYSIS

Constitutionality.  
 Accomplice.  
 Affirmative Defense.  
 Aggravating Circumstances.  
 Death Penalty.  
 Double Jeopardy.  
 Evidence.  
 Indictment or Information.  
 Indifference to Human Life.  
 Instructions.  
 Intent.  
 Judicial Review.  
 Jurisdiction.  
 Lesser Included Offenses.  
 Miranda Warnings.  
 Premeditation and Deliberation.  
 Trial Proceedings.  
 Underlying Felony.

**Constitutionality.**

At the conclusion of the guilt phase of the death-row inmate's trial, the state trial court instructed the jury on the elements of capital murder, subdivision (a)(1) of this section, and first-degree murder, § 5-10-102(a)(1), which were substantively identical because the underlying felony for both offenses was kidnapping; this overlap did not violate due process by risking arbitrary decisionmaking in a capital case. *Williams v. Norris*, 576 F.3d 850 (8th Cir. 2009).

Circuit court erred by denying appellant juvenile's petition for writ of habeas corpus; because he was only fourteen years old when he committed capital-murder and aggravated-robbery, his mandatory sentence of life imprisonment without parole violated the Eighth Amendment, U.S. Const. amend. VIII. In considering the capital-murder statute as it pertained to juveniles, the Supreme Court of Arkansas severed portions of subsection (c) of this section which provided that capital murder was punishable by death or life imprisonment without parole. *Jackson v. Norris*, 2013 Ark. 175, — S.W.3d — (2013).

Juvenile's capital-murder sentence of life without parole under subsection (c) of this section was unconstitutional; the case was remanded for resentencing under the discretionary range for a Class Y felony, § 5-4-401(a)(1), after a sentencing hearing at which the juvenile could present mitigating evidence to a jury. *Whiteside v. State*, 2013 Ark. 176, — S.W.3d — (2013).

**Accomplice.**

Trial court did not err in denying defendant's motion for directed verdict as there was sufficient evidence to support defendant's conviction of the underlying felony, aggravated robbery, and capital-murder, after eliminating the accomplice testimony; other corroborating evidence demonstrated that defendant had the purpose of committing theft with the use of physical force, was armed with a deadly weapon, and caused the death of the victim and, further, a doctor testified that the victim died from a gunshot wound. *Gardner v. State*, 364 Ark. 506, 221 S.W.3d 339 (2006).

Defendant's conviction for capital murder, in violation of subdivision (a)(4) of this section, was proper because there was substantial evidence that defendant was guilty as an accomplice pursuant to §§ 5-2-401, 5-2-402(2) and 5-2-403(b)(1), (2), and his argument that there was insufficient evidence of his acting as an accomplice by encouraging, aiding, or assisting the killer in stabbing the victim, was not preserved for review. *Lawshea v. State*, 2009 Ark. 600, 357 S.W.3d 901 (2009).

**Affirmative Defense.**

Trial court did not err by rejecting defendant's argument that the affirmative defense provisions of subsection (b) of this section unconstitutionally shifted the burden of proof to defendant because he failed to meet the high burden of showing that the court's refusal to overrule cases holding that the statute was constitutional would result in great injustice or injury. *Jefferson v. State*, 372 Ark. 307, 276 S.W.3d 214 (2008).



### Aggravating Circumstances.

In the death-row inmate's capital murder trial, the pecuniary gain statutory aggravating factor did not unconstitutionally fail to narrow the class of death-eligible offenders on the ground that it merely duplicated an element of the underlying crime of felony murder during the course of a robbery, because the jury in the inmate's case was not instructed that the felony underlying the charge of capital murder was robbery; rather, the jury was instructed that the underlying felony was kidnapping, pursuant to subdivision (a)(1)(iii) of this section, and that, consistent with the statutory definition of kidnapping under § 5-11-102(a)(3)-(5), it had to find that the inmate had restrained the victim with the purpose of inflicting physical injury upon her or engaging in sexual intercourse or sexual contact, or of committing aggravated robbery or any flight thereafter. After convicting the inmate of capital murder, the jury found in the penalty phase that he committed the murder for pecuniary gain, consistent with § 5-4-604(6); thus, there was no duplication of constitutional dimension or otherwise. *Williams v. Norris*, 576 F.3d 850 (8th Cir. 2009).

After defendant's conviction of capital murder, the jury that sentenced him to death properly found the existence of aggravating factors involving cruelty and depravity, as evidence that defendant broke into the victim's apartment, waited hours for her to return, and then viciously attacked her as she walked in the door, stabbing her several times, was sufficient to prove the murder was especially cruel or depraved. *Marcyniuk v. State*, 2010 Ark. 257, 373 S.W.3d 243 (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 402 (Aug. 6, 2010).

### Death Penalty.

In defendant's trial for capital murder, the testimony of the victim's father, two sisters, and one of her children was not unduly prejudicial but rather was relevant to show the impact her death had on her family, which was precisely the purpose envisioned by the Arkansas General Assembly in enacting § 5-4-602(4); thus, the trial court did not abuse its discretion in admitting victim-impact evidence during defendant's sentencing because such evidence was relevant under the Arkansas

capital-murder-sentencing process. *Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006), cert. denied, 550 U.S. 939, 127 S. Ct. 2257, 167 L. Ed. 2d 1100 (2007).

Where defendant was sentenced to death after his conviction of capital murder, as the jury acknowledged that he suffered from borderline-personality disorder and generalized anxiety disorder but found that those disorders did not prevent from being able to conform his behavior to the law and that he was not under extreme mental or emotional disturbance at the time of the murder, the trial court met its obligation to bring before the jury mitigating factors regarding defendant's mental disease or defect. *Marcyniuk v. State*, 2010 Ark. 257, 373 S.W.3d 243 (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 402 (Aug. 6, 2010).

### Double Jeopardy.

Defendant convicted of capital murder, attempted capital murder, and aggravated robbery failed to show that his double jeopardy rights were violated; under subdivision (d)(1)(A) of this section, separate convictions and sentences were authorized for both the capital murder and the felony underlying the capital-murder charge. *Jackson v. State*, 2013 Ark. 19, — S.W.3d — (2013).

Defendant convicted of capital murder, attempted capital murder, and aggravated robbery failed to show that his double jeopardy rights were violated; under subdivision (d)(1)(A) of this section, separate convictions and sentences were authorized for both the capital murder and the felony underlying the capital-murder charge. *Jackson v. State*, 2013 Ark. 19, — S.W.3d — (2013).

### Evidence.

Trial court did not err by denying defendant's motion for a directed verdict on his capital murder conviction because the evidence was sufficient to support defendant's conviction of the underlying felony, aggravated robbery, even after eliminating the testimony of one of defendant's accomplices. Evidence showed that: (1) defendant had the purpose of committing a theft with the use of physical force, as he and three other individuals went to a witness's house to acquire ammunition for their firearm; (2) the fourth individual

testified that defendant and three men arrived at his trailer where defendant displayed a gun, and that he provided ammunition for the gun; (3) a second witness, one of the three men who accompanied defendant, testified that he heard two gunshots fired after the two other men left the victim's apartment after the struggle between defendant and the victim ensued; and (4) the chief medical examiner testified that the victim died from a gunshot wound. *Gardner v. State*, 362 Ark. 413, 208 S.W.3d 774 (2006).

Although the state was required to prove that defendant was in prison when he killed his cell mate to prove capital murder, that element could have been proven by stipulation and the trial court abused its discretion in allowing the state, over defendant's objections, to introduce evidence of his life sentence and convictions for rape, kidnapping, and burglary; the error was harmless, however, as defendant was not prejudiced by the evidence in that the jury did not sentence him to death but, rather, to a second life sentence. *Diemer v. State*, 365 Ark. 61, 225 S.W.3d 348 (2006).

Evidence was sufficient to corroborate an accomplice's testimony and sustain defendant's capital murder and kidnapping convictions where the victim stole defendant's marijuana plants, defendant received a call shortly after the murders to go and help his son clean up a mess and defendant's nephew testified that defendant approached him and told him that if he ever said anything about the victim he would get hurt. *Green v. State*, 365 Ark. 478, 231 S.W.3d 638 (2006).

Where evidence showed that (1) defendant walked back to the car to retrieve a gun and shot the victim in vital areas, (2) defendant made several inculpatory comments when he went back to the car, and (3) he fled from police, there was sufficient evidence to support a capital murder conviction. *Davis v. State*, 365 Ark. 634, 232 S.W.3d 476 (2006).

Defendant's conviction for capital murder was supported by substantial evidence where, pursuant to § 5-2-403(b)(1)-(2), he served as an accomplice to the murder by directing his brother to "come on down" from the attic because the victim moved, suggesting that his brother needed to finish killing the victim, which he did while defendant watched. *Wilson v.*

*State*, 365 Ark. 664, 232 S.W.3d 455 (2006).

Where defendant was convicted of aggravated robbery and capital murder for killing a grocery store owner, the trial court did not err in denying defendant's motion for a directed verdict because the jury did not have to resort to speculation and conjecture as it apparently believed testimony from defendant's four friends concerning his actions and admissions on the night the crimes were committed and the next day when he fled. *Whitt v. State*, 365 Ark. 580, 232 S.W.3d 459 (2006).

There was sufficient evidence to support convictions for aggravated robbery and capital murder based on defendant's admission that she held the victim's hands down while he was beaten inside an apartment during an alleged robbery and the testimony of an accomplice waiting outside; the accomplice testimony was sufficiently corroborated. *Johnson v. State*, 366 Ark. 8, 233 S.W.3d 123 (2006), appeal dismissed, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 251 (2007).

There was sufficient evidence to support a conviction under subdivision (a)(1) of this section where evidence showed that two murders were committed during a robbery, defendant made inculpatory statements regarding the robbery, the victims had a large amount of cash, and defendant made calls to their phone on the day of the shooting. *Harris v. State*, 366 Ark. 190, 234 S.W.3d 273 (2006).

Appellant's capital murder conviction was affirmed where a prosecution witness testified numerous times that he saw appellant shoot the victim; that testimony alone was enough to sustain the conviction, and it was for the jury to determine the credibility of another witness whose description of the shooter was inconsistent with that testimony. *Gaye v. State*, 368 Ark. 39, 243 S.W.3d 275 (2006).

Despite defendant's assertion that a shooting was accidental, a motion for a directed verdict was properly denied because there was sufficient evidence to support a conviction for capital murder under § 5-10-101(a)(4), based on the testimony of witnesses to the crime, a prior threat to kill the victim, and the fact that the victim was shot several times. The evidence showed that defendant went to the victim's apartment, hit her several times, and shot and killed her when friends tried



to intervene. *Boyd v. State*, 369 Ark. 259, 253 S.W.3d 456 (2007).

Evidence was sufficient to sustain a capital murder conviction because defendant was with the victim the night before he was found dead in his recliner, there was blood splatter on his walls, an empty carton was found next to the victim's recliner that described a canister of pepper spray, and when defendant was arrested, a canister of pepper spray was found on defendant's person. The chief forensic DNA examiner testified that blood samples from defendant's jeans matched the genetic profile of the victim. *Young v. State*, 370 Ark. 147, 257 S.W.3d 870 (2007).

Directed verdict was properly denied because a jury entered a general verdict; therefore, it was impossible which part of this section defendant was convicted under. Since defendant's sufficiency challenge only went to proof of the underlying felony, there was sufficient evidence regarding the other elements of capital murder where defendant shot her husband while he slept and took his property. *Terry v. State*, 371 Ark. 50, 263 S.W.3d 528 (2007).

Defendant's conviction for capital murder was proper pursuant to subdivisions (a)(1) and (a)(1)(vi) of this section because defendant's own testimony indicated that he stabbed the victim and took his property as part of the same incident. The number of wounds, coupled with the testimony that there were some defensive and post-mortem wounds, was sufficient to show circumstances manifesting defendant's extreme indifference to the value of human life. *Young v. State*, 371 Ark. 393, 266 S.W.3d 744 (2007).

Defendant's capital-murder conviction in violation of subdivision (a)(4) of this section was appropriate because defendant stabbed the victim repeatedly, walked away, and then returned to stab him again. That testimony, along with other evidence showing the nature, location, and extent of the 45 knife wounds, permitted the jury to reasonably infer that defendant murdered the victim with both premeditation and deliberation. *Winston v. State*, 372 Ark. 19, 269 S.W.3d 809 (2007).

Evidence supported the notion that the victim's death was caused in the course of the aggravated robbery, and the manner

of his death indicated that it was caused under circumstances manifesting extreme indifference to the value of human life; a witness's account of defendant's confession indicated that the victim was crying and pleading for his life before he was killed. *Moore v. State*, 372 Ark. 579, 279 S.W.3d 69 (2008).

At trial for capital murder and unlawful discharge of a firearm from a vehicle, witnesses' in-court identifications of defendant were not so unreliable that his conviction should be overturned because: (1) the jury clearly found the witnesses and their identifications of defendant credible; (2) defendant did not challenge or object to the witnesses' in-court identifications when they were made, but instead attempted to discredit their testimony on cross-examination; and (3) he merely challenged the in-court identifications in the context of his challenge to the sufficiency of the evidence. *Davenport v. State*, 373 Ark. 71, 281 S.W.3d 268 (2008).

Evidence was sufficient to convict defendant of capital murder and a terroristic act when a witness, a retired deputy sheriff, described the perpetrator of a shooting, and defendant matched the description; moreover, a witness testified as to a possible motive, and defendant's relative testified that defendant had asked the relative to lie for defendant. *Stephenson v. State*, 373 Ark. 134, 282 S.W.3d 772 (2008).

Where defendant's friend testified that defendant tried to rob the victim in his truck and shot him when he resisted, defendant's fingerprints were found on the truck and the blood on the gun matched defendant's DNA. Even if the friend was deemed an accomplice for purposes of §§ 5-2-403 and 16-89-111(e)(1)(A), the Supreme Court of Arkansas found sufficient corroborating evidence to support defendant's conviction for capital murder. *Bush v. State*, 374 Ark. 506, 288 S.W.3d 658 (2008).

Defendant's convictions for two counts of capital murder in violation of former § 41-1501(c) were appropriate because the evidence was sufficient since defendant's former wife testified that defendant was not home on the night in question, that a shotgun was missing, and that defendant told the wife's daughter that she would not have to return to her father's home. The child's father was one of

the victims. *Wertz v. State*, 374 Ark. 256, 287 S.W.3d 528 (2008).

Substantial evidence supported the jury's verdict of premeditated and deliberated capital murder under subdivision (a)(4) of this section where defendant was identified by three separate witnesses as being in the house with the victim moments before the body was discovered and he was seen bending over the location of the body; a knife with the victim's blood on it was found close by the victim's body and defendant's footprints were in the blood at the scene. *Sales v. State*, 374 Ark. 222, 289 S.W.3d 423 (2008), cert. denied, *Sales v. Arkansas*, — U.S. —, 129 S. Ct. 2000, 173 L. Ed. 2d 1098 (2009).

Defendant's capital-murder conviction under subdivision (a)(4) of this section was appropriate because he admitted in his statement that he killed the victim and the fact that over a minute elapsed between the shot to the victim's thigh and the shot to the victim's head sufficiently showed premeditation and deliberation. *Jackson v. State*, 375 Ark. 321, 290 S.W.3d 574 (2009), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 440 (Feb. 12, 2009).

Defendant's conviction for attempted capital murder, in violation of subdivision (a)(4) of this section and § 5-3-201(a)(2), was supported by the evidence because the victim, defendant's wife, testified that he came into the garage demanding to talk to her, shot her, and commented that she should die; defendant's coworker testified that defendant stated that he was going to shoot his wife if she had any divorce papers. *Johnson v. State*, 375 Ark. 462, 291 S.W.3d 581 (2009), cert. denied, *Johnson v. Arkansas*, 558 U.S. 847, 130 S. Ct. 118, 175 L. Ed. 2d 77, 2009 U.S. LEXIS 5218 (2009).

Defendant's capital-murder convictions in violation of subdivision (a)(4) of this section were appropriate because the evidence was sufficient to support an inference of premeditation and deliberation. One victim was shot multiple times and some of those shots were fired at close range; the other victim's gunshots to his neck originated from behind; and there was no evidence to indicate that defendant's self-defense argument was valid. *Wallace v. State*, 2009 Ark. 90, 302 S.W.3d 580 (2009).

Where three eyewitnesses testified and identified defendant as the person who fired the shot that killed the victim, his car also matched the description of the car driven by the shooter. The Supreme Court of Arkansas held that the evidence was sufficient to sustain the jury's verdict finding him guilty of murder; the trial court did not err by denying defendant's motion for a directed verdict. *Page v. State*, 2009 Ark. 112, 313 S.W.3d 7 (2009).

Defendant's convictions for two counts of capital murder in violation of subdivision (a)(4) of this section and two counts of kidnapping in violation of § 5-11-102(a) were appropriate, in part because evidence that defendant possessed a gun similar to that used in the murder was independently relevant proof on the issue of defendant's identity. Moreover, its probative value was not substantially outweighed by the danger of unfair prejudice. *Gilcrease v. State*, 2009 Ark. 298, 318 S.W.3d 70 (2009).

Defendant's conviction of capital murder under subdivision (a)(9)(A) of this section was affirmed because the evidence, including testimony from a doctor that victim's injuries were not consistent with defendant's version of events and testimony of sergeant that defendant did not explain events until after he learned of injuries, was sufficient. *Jackson v. State*, 2009 Ark. 336, 321 S.W.3d 260 (2009), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 586 (Sept. 10, 2009).

In defendant's capital murder trial arising out of the beating death of the two-year-old child of defendant's girlfriend, the evidence, although circumstantial, was sufficient to support his conviction because it established that the child was in good physical condition when entrusted to defendant's care and that she suffered fatal injuries while in defendant's sole custody. The jury did not err in rejecting defendant's testimony that the child slipped and fell, hitting her head on the floor, because the doctors who treated the child testified that this explanation was implausible and was inconsistent with the head injuries suffered by the child; further, the child suffered extensive injuries over her entire body, and defendant offered no explanation for the origin of the many other significant injuries, which the doctors testified were the result of blunt



force trauma. *Smith v. State*, 2009 Ark. 453, 343 S.W.3d 319 (2009).

Evidence was sufficient to show that defendant bound and robbed the victim, that he left her alone in the loft and fled, and that her death was a result of being bound, and defendant clearly intended to restrict the victim's ability to breathe and abandon her in a perilous position, which culminated in her death; there was sufficient evidence to prove defendant deliberately engaged in life-threatening behavior. *Sykes v. State*, 2009 Ark. 522, 357 S.W.3d 882 (2009).

There was sufficient evidence that defendant killed a victim in the course and furtherance of a robbery and there was a nexus between the murder and the robbery where after striking both victims, defendant grabbed the robbery victim and demanded money. *Norris v. State*, 2010 Ark. 174, 368 S.W.3d 52 (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 292 (May 20, 2010).

In a capital murder prosecution, the trial court did not abuse its discretion by allowing the state to show the jury enlarged photos of the victim's body on a projection screen, as the photos illustrated the crime scene, autopsy photographs were used by the forensic examiner to explain the nature of the injuries and cause of death, and the court examined each photo and applied the proper balancing test. *Marcyniuk v. State*, 2010 Ark. 257, 373 S.W.3d 243 (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 402 (Aug. 6, 2010).

Evidence was sufficient to convict defendant of the capital murder of a victim and theft of the victim's vehicle, including eyewitnesses who saw defendant driving the victim's car and saw him with a .45 caliber pistol, the same caliber that was used to kill the victim, at the time of the murder. *Lockhart v. State*, 2010 Ark. 278, 367 S.W.3d 530 (2010).

Defendant's conviction for capital murder, in violation of subdivision (a)(4) of this section, was supported by the evidence because the state presented evidence that defendant had grown weary of the victim's behavior, that defendant was intrigued by the idea of killing someone, that defendant believed the victim would be a good choice because of the victim's personality and circumstances, that defendant purchased a knife, that defendant

approached the victim with the knife while the victim was passed out, and that defendant stabbed the victim five times. *Pearcy v. State*, 2010 Ark. 454, 375 S.W.3d 622 (2010).

Defendant's conviction for capital murder under subdivision (a)(4) of this section was supported by substantial evidence that included witness testimony that he had been looking for a victim on the day he was killed, he was in possession of a handgun, and he made threats against the victim. *Evans v. State*, 2011 Ark. 33, 378 S.W.3d 82 (2011).

Defendant's conviction for capital murder under subdivision (a)(4) of this section was appropriate because the evidence was sufficient. When confronted with the inconsistencies between the testimony of his daughter's mother and defendant's testimony, the jury believed the mother and found that defendant acted with premeditation and deliberation by taking the shotgun to the house, walking to the porch, loading the gun, and firing at the victim after she threw her hands in surrender. *Williams v. State*, 2011 Ark. 432, 385 S.W.3d 157 (2011).

Defendant's conviction for capital-felony murder under subdivision (a)(1) of this section and § 5-12-103(a)(3) was appropriate because the evidence was sufficient. The last number dialed on the victim's cellular phone was to a phone registered to defendant and a fellow prisoner testified that defendant confessed to selling drugs to the victim, robbing and shooting him, and then leaving him on the road. *Dixon v. State*, 2011 Ark. 450, 385 S.W.3d 164 (2011).

Defendant's conviction for capital murder under subdivision (a)(4) of this section was proper because the circuit court did not err in denying his motion for a directed verdict. Defendant's stabbing of the victim brought about the officers' use of deadly force that killed the victim; had defendant not been stabbing her, the officers would not have attempted to end defendant's attack on her by using deadly force. *Anderson v. State*, 2011 Ark. 461, 385 S.W.3d 214 (2011).

Substantial evidence supported defendant's conviction for capital murder, in violation of subdivision (a)(1)(B) of this section, because the state offered evidence to corroborate defendant's confession; the state presented evidence that the murder

victim died at the hands of another. *Meadows v. State*, 2012 Ark. 57, 386 S.W.3d 470 (2012), rehearing denied, — S.W.3d —, 2012 Ark. LEXIS 136 (Ark. Mar. 15, 2012).

Trial court did not err by denying defendant's motion for a directed verdict because the evidence was sufficient to support his capital murder conviction, as it showed that: (1) prior to the victim's death, defendant bragged to a witness that he was going to kill someone; (2) several hours later, an eyewitness was in the cab of the truck sitting between defendant and the victim when defendant began stabbing the victim repeatedly with a knife; (3) two other witnesses who stopped to help heard defendant admit that he had stabbed the victim and saw defendant toss the knife into the back of the truck; (4) one witness heard defendant tell the eyewitness that they needed to take the truck and get rid of the body; (5) the knife was recovered from the truck and blood on it matched the victim; (6) defendant identified the knife as his own; (7) the victim died as a result of multiple stab wounds that were consistent with the knife that was recovered from the truck; and (8) although there was testimony that defendant was intoxicated on the night of the murder, voluntary intoxication was not a defense. *Leach v. State*, 2012 Ark. 179, — S.W.3d — (2012).

Evidence was sufficient to sustain defendant's convictions for capital murder and aggravated robbery because defendant drove his accomplice to the victim's house, defendant admitted to hitting the victim over the head, and the evidence illustrated he wanted to harm the victim because he did it again after he stated that the victim was not fazed. Additionally, the victim's wallet was taken from the house. *Laswell v. State*, 2012 Ark. 201, — S.W.3d — (2012).

Evidence was sufficient to sustain convictions for capital murder and aggravated robbery because a witness's testimony corroborated that defendant was an accomplice to the aggravated robbery, defendant knew there was a large amount of marijuana at the home, a gun was used during the robbery, and the victim's death occurred during the robbery under circumstances manifesting extreme indifference to the value of human life. *Bradley v. State*, 2013 Ark. 58, — S.W.3d — (2013).

### **Indictment or Information.**

There was no violation of § 16-85-407 when an information in a capital murder trial was amended a few days before trial to include a premeditation and deliberation element because defendant was not surprised by such; her own admissions showed that she acted in a premeditated and deliberative manner when she shot her husband as he slept, she had wanted to leave for a long time, and she fled with some of his belongings. Therefore, there was nothing wrong with including the premeditation and deliberation elements in the jury instructions. *Terry v. State*, 371 Ark. 50, 263 S.W.3d 528 (2007).

### **Indifference to Human Life.**

Denial of defendant's motion for directed verdict on capital murder and aggravated murder charges under this section and §§ 5-12-102 and 5-12-103 was proper as the evidence showed that defendant held a pistol, a deadly weapon, and that he committed theft while armed with the pistol; the evidence also showed that he caused the death of the victim in immediate flight from the aggravated robbery under circumstances manifesting extreme indifference to the value of human life. *Flowers v. State*, 373 Ark. 119, 282 S.W.3d 790 (2008).

### **Instructions.**

In addition to instructions on the elements of capital murder, the jury was instructed on lesser included offenses of first-degree murder, second-degree murder, and manslaughter, and defendant not assert that the model jury instructions inaccurately reflected the law; thus, despite his contention that his proffered instructions were more inclusive and a more clear statement of the law on the various issues, the trial court did not err in refusing to submit them to the jury in his capital murder case. *Adams v. State*, 2009 Ark. 375, 326 S.W.3d 764 (2009), rehearing denied, *Adams v. State*, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 556 (Sept. 10, 2009), cert. denied, *Adams v. Arkansas*, 559 U.S. 1021, 130 S. Ct. 1922, 176 L. Ed. 2d 392 (2010).

### **Intent.**

To be guilty of capital murder under subdivision (a)(10) of this section, defendant's conduct evidencing a purposeful mental state was his firing a gun from his



vehicle toward the vehicle of three acquaintances with the knowledge that the target vehicle was occupied. It was not required that he acted purposely with regard to killing of the victim. *Price v. State*, 373 Ark. 435, 284 S.W.3d 462 (2008).

### **Judicial Review.**

Trial court did not err by denying defendant's motion for a directed verdict on the capital murder charge because: (1) but for defendant's aggravated robbery, speeding, and fleeing from the police, the trooper would not have been in the roadway attempting to retrieve stop sticks and would not have been struck by another trooper's vehicle; (2) the state presented sufficient evidence that defendant acted under circumstances manifesting an extreme indifference to the value of human life, as it showed that defendant robbed the victim with a gun, fled with his accomplice and the loot in a stolen car on a busy interstate, and initiated a high-speed chase while being pursued by several law enforcement officers with their lights and sirens blaring, thereby engaging in life-threatening activity; and (3) the phrase "under circumstances manifesting extreme indifference to the value of human life" was not void for vagueness, as the cases interpreting the phrase provided fair warning that it involved a life-threatening activity. *Jefferson v. State*, 372 Ark. 307, 276 S.W.3d 214 (2008).

### **Jurisdiction.**

Defendant's contention that the evidence was insufficient to prove that the murder took place in Arkansas was rejected as, although evidence showed that the victim's body was found in Oklahoma, and there was no positive evidence presented that the crime actually occurred outside of Arkansas; the record provided ample substantial evidence that, at the very least, the premeditation and deliberation element of capital murder and kidnapping by deception occurred in Arkansas. *Smith v. State*, 367 Ark. 274, 239 S.W.3d 494 (2006).

### **Lesser Included Offenses.**

Trial court did not err in refusing to give a jury instruction concerning different criminal liabilities of co-defendants because the jury found defendant guilty of capital murder, even though it had been

instructed on the lesser included offenses of first and second-degree murder; thus, any error in failing to give a manslaughter or negligent homicide instruction was cured. *Vidos v. State*, 367 Ark. 296, 239 S.W.3d 467 (2006).

Circuit court erred in instructing the jury on felony manslaughter as a lesser included offense of capital felony murder, because the "extreme indifference" element was not a culpable mental state relating to a specific homicide victim but merely described the dangerous circumstances generally set in motion by defendant, and since the "extreme indifference" standard was not a mens rea related to a specific victim, it could not support a lesser included offense based on a less culpable mental state; the sole mens rea element in capital felony murder and first degree felony murder related to the underlying felony and not to the homicide itself. *Perry v. State*, 371 Ark. 170, 264 S.W.3d 498 (2007).

Prohibition against double jeopardy was not violated when defendant was convicted of aggravated robbery and attempted capital murder because the robbery was the underlying felony, and aggravated robbery was not the lesser included offense of attempted capital murder. *Clark v. State*, 373 Ark. 161, 282 S.W.3d 801 (2008).

Aggravated robbery is not a lesser included offense of attempted capital murder because, while an aggravated-robbery charge shares the intent to rob with attempted capital murder, aggravated robbery also requires one of three other elements. Two of those elements, being armed with a deadly weapon, or representing as such, are unique to aggravated robbery, and the third possible element of aggravated robbery is having inflicted or attempted to inflict death or serious physical injury upon another, which is not equivalent to the element in attempted capital murder that a defendant, in the course of or in flight from such robbery, caused the death of a person under circumstances manifesting extreme indifference to the value of human life. *Clark v. State*, 373 Ark. 161, 282 S.W.3d 801 (2008).

### **Miranda Warnings.**

With respect to a defendant convicted of capital murder, the trial court did not err

in finding that defendant knowingly, voluntarily, and intelligently waived his Miranda rights because: (1) two police officers contradicted defendant's assertion that he was in no condition to make any kind of statement and that he did not understand his Miranda rights, and (2) the trial judge himself had listened to the tape of the interview and so was able to hear for himself whether or not defendant sounded as if he were impaired. *Reese v. State*, 371 Ark. 1, 262 S.W.3d 604 (2007).

### **Premeditation and Deliberation.**

There was substantial evidence for the jury to conclude that defendant made a premeditated and deliberate choice to shoot and kill the victim, thus, the trial court did not err by denying defendant's motion for a directed verdict; there was testimony that defendant had possession of the weapon that was used to kill the victim, that defendant had a motive to kill him, and that the shots at the victim were intentional and not random shots into the building. *Weston v. State*, 366 Ark. 265, 234 S.W.3d 848 (2006).

With respect to a defendant convicted of capital murder, there was sufficient evidence of premeditation and deliberation because: (1) evidence showed that the defendant shot the victim four times, including three shots to the head; (2) the nature and location of gunshot wounds were evidence that the jury could have relied on to infer that the defendant acted with premeditation and deliberation; and (3) there was direct evidence that the defendant stated repeatedly that he intended to kill the victim. *Reese v. State*, 371 Ark. 1, 262 S.W.3d 604 (2007).

Defendant who stabbed a victim multiple times with a long knife could not be found guilty of aggravated robbery absent evidence that he was trying to get money in addition to money that he had lost to the victim by gambling. His felony-capital murder charge based on the robbery was likewise reversed; however, his premeditated and deliberate purpose capital murder conviction was upheld. *Daniels v. State*, 373 Ark. 536, 285 S.W.3d 205 (2008), superseded by statute as stated in, *Heard v. State*, 2009 Ark. 546, 354 S.W.3d 49 (2009).

Substantial evidence was presented to the jury to support a capital murder verdict under subdivision (a)(4) of this section

and a finding that defendant murdered the victim with premeditation and deliberation, given that (1) a witness testified to seeing defendant and the victim fighting, then they split up, then defendant went back inside his house a second time before emerging with a shotgun, (2) as the victim began to drive away, defendant fired, and (3) the victim's death was caused by the shotgun pellet; the court rejected defendant's claim that the trial court erred in denying his motions for a directed verdict. *Adams v. State*, 2009 Ark. 375, 326 S.W.3d 764 (2009), rehearing denied, *Adams v. State*, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 556 (Sept. 10, 2009), cert. denied, *Adams v. Arkansas*, 559 U.S. 1021, 130 S. Ct. 1922, 176 L. Ed. 2d 392 (2010).

Defendant's conviction of capital murder was upheld, as evidence that he stalked the victim; broke into her apartment and waited for her for hours; stabbed her when she opened the door; violently struggled with her while she begged for her life; hid her body and fled, was sufficient to establish premeditation and deliberation under subdivision (a)(4) of this section. *Marcyniuk v. State*, 2010 Ark. 257, 373 S.W.3d 243 (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 402 (Aug. 6, 2010).

Armed defendant's statements to a bank courier, "Come on with the bags, don't make me kill you," along with his firing the gun three times, provided evidence of deliberation by showing that he considered killing the courier, supporting his conviction for attempted premeditated capital murder. *Ali v. State*, 2011 Ark. App. 758, — S.W.3d — (2011).

### **Trial Proceedings.**

Denial of defendant's motion for a brain injury examination did not deprive defendant of a basic tool for his defense as defendant was examined by a psychologist and he failed to object to the admission of the psychologist's report into evidence; defendant could not assert that failure to appoint a head-injury expert rose to the level of protection afforded by the third Wicks exception as (1) defendant was given an opportunity by the trial court to renew the motion for an appointment of the expert but he failed to do so, (2) it was not the trial court's duty to adequately prepare and present defendant's defense,



and (3) defendant's argument could not be reviewed as an issue that fell within the purview of Ark. R. App. P. Crim. 10(b)(iv) because it was not a serious error requiring the trial court to intervene and issue an admonition or declare a mistrial. *Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006), cert. denied, 550 U.S. 939, 127 S. Ct. 2257, 167 L. Ed. 2d 1100 (2007).

Mistrial should have been granted at a trial for capital murder pursuant to this section because a witness testified that defendant had previously been convicted of terroristic threatening for an incident involving the murder victim. Though there was no proof that defendant had been convicted of terroristic threatening, the state received the benefit of prejudicial testimony, and the statement was so prejudicial that it could not be cured by an

admonition to the jury. *Williams v. State*, 2010 Ark. 89, 377 S.W.3d 168 (2010).

### Underlying Felony.

There was substantial evidence that defendant committed felony capital murder, subdivision (a)(1) of this section, where the victim was a frail, disabled man who could not defend himself and this constituted substantial evidence that defendant killed the victim under circumstances manifesting extreme indifference to the value of human life and that he robbed the victim while armed with a deadly weapon and that he inflicted death in the course of that robbery. *Sales v. State*, 374 Ark. 222, 289 S.W.3d 423 (2008), cert. denied, *Sales v. Arkansas*, — U.S. —, 129 S. Ct. 2000, 173 L. Ed. 2d 1098 (2009).

**Cited:** *Rhodes v. State*, 2009 Ark. App. 665, — S.W.3d — (2009).

## 5-10-102. Murder in the first degree.

### RESEARCH REFERENCES

**ALR.** Sufficiency of Evidence to Support Homicide Conviction Where No Body Was Produced. 65 A.L.R.6th 359.

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

### CASE NOTES

#### ANALYSIS

Constitutionality.  
Construction.  
Assistance of Counsel.  
Attempted Murder.  
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Indictment or Information.  
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Intent.  
—Evidence.  
Lesser Included Offenses.  
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Serious Physical Injury.

#### Constitutionality.

At the conclusion of the guilt phase of the death-row inmate's trial, the state trial court instructed the jury on the elements of capital murder, § 5-10-101(a)(1), and first-degree murder, subdivision (a)(1) of this section, which were substantively identical because the underlying felony

for both offenses was kidnapping; this overlap did not violate due process by risking arbitrary decisionmaking in a capital case. *Williams v. Norris*, 576 F.3d 850 (8th Cir. 2009).

#### Construction.

Circuit court erred in instructing the jury on felony manslaughter as a lesser included offense of capital felony murder, because the "extreme indifference" element was not a culpable mental state relating to a specific homicide victim but merely described the dangerous circumstances generally set in motion by defendant, and since the "extreme indifference" standard was not a mens rea related to a specific victim, it could not support a lesser included offense based on a less culpable mental state; the sole mens rea element in capital felony murder and first degree felony murder related to the underlying felony and not to the homicide itself. *Perry v. State*, 371 Ark. 170, 264 S.W.3d 498 (2007).

**Assistance of Counsel.**

Denial of appellant's, an inmate's, petition for postconviction relief was proper because, while he was not able to directly appeal any challenge to the sufficiency of the evidence, there was substantial evidence to support his felony-murder conviction. He failed to demonstrate that he was prejudiced by trial counsel's error in failing to make a directed-verdict motion on the lesser-included charge of first-degree felony murder under subdivision (a)(1) of this section. *Lockhart v. State*, 2011 Ark. 396, — S.W.3d — (2011).

**Attempted Murder.**

Evidence was sufficient to sustain defendant's conviction for attempted first-degree murder under § 5-3-201(a)(2) and subdivision (a)(1) of this section as the evidence demonstrated that defendant, in the process of fleeing a store that he had just robbed at gunpoint, shot at a police officer two times. A jury could reasonably conclude that the act of shooting at someone was a substantial step toward causing that person's death. *Lambert v. State*, 2011 Ark. App. 258, — S.W.3d — (2011).

**Evidence.**

There was sufficient evidence to establish that defendant acted with the purpose of causing the death of the victim; there was eyewitness testimony and the fact that defendant confessed the murder, plus third-party testimony placed defendant at the crime scene. *Price v. State*, 365 Ark. 25, 223 S.W.3d 817 (2006).

Trial court did not err in admitting juvenile defendant's confession to police officer as the transcript of the interview revealed that no assurance had been given regarding defendant being tried under the juvenile code; to the contrary, the transcript showed that the confession was given of defendant's own free will. *Holland v. State*, 365 Ark. 55, 225 S.W.3d 353 (2006).

Evidence was sufficient to convict defendant of first degree murder and theft where, in addition to the testimony of defendant's wife, who was an accomplice, defendant's own statements to the police, his conduct before and after the crime, and statements of the victim's friends regarding her fear of defendant tended to connect him to the crimes; further, although there was no evidence that defen-

dant ever drove victim's Cadillac or had the vehicle in his possession, the jury might have determined that defendant facilitated the theft by leaving the accomplice without a vehicle at the victim's house, and there was evidence that the theft of the Cadillac was part of the plan to murder the victim. *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006).

There was substantial evidence to support defendant's convictions where one victim had an order of protection against defendant, he owned a gun that was consistent with the murder weapon, and he was seen the night of crime carrying a bag where he kept the gun; further, after the victim filed for divorce, defendant became increasingly obsessed with her, and a witness saw a fight between defendant and the victim and testified that defendant stated that he would rather see the victim dead than with another man. *Brunson v. State*, 368 Ark. 313, 245 S.W.3d 132 (Dec. 14, 2006).

Evidence was sufficient to sustain defendant's first degree murder conviction because defendant had a key to the victim's apartment, he admitted that he was at the apartment on the evening of the murder, defendant purchased drugs that night and told the seller that he had "busted a some-bitch's head," and defendant lied to the police during the investigation. *Dunn v. State*, 371 Ark. 140, 264 S.W.3d 504 (2007).

Evidence was sufficient to sustain a first degree murder conviction because defendant admitted to hitting, kicking, and stabbing the victim, a knife blade was found at the crime scene, and a matching handle was later found at defendant's house, and defendant's statement to the investigating officer indicated that his conscious object was to cause the death of the victim. *Navarro v. State*, 371 Ark. 179, 264 S.W.3d 530 (2007).

Sufficient evidence supported defendant's convictions for first-degree murder under subsection (a) of this section, and aggravated robbery under § 5-12-103(a), including the testimony of several witnesses who saw defendant with the victim's car, as well as the testimony of two witnesses who saw defendant drive the car under the bridge where the victim's body was found and return without the victim in the car. Defendant told one witness that he intended to kill the victim



and steal his car, and after the murder he boasted about shooting the victim and showed two witnesses the bullet he found in the victim's car; the bullet he was carrying was consistent with the suspected murder weapon, and the victim's blood was found on his clothing. *Boldin v. State*, 373 Ark. 295, 283 S.W.3d 565 (2008).

Where defendant confessed and the state's witnesses testified that she shot two victims while they were sitting in her rental car, defendant fled the scene with blood on her hands; parts from a gun were found where she was hiding. The evidence was sufficient to support her conviction for two counts of first-degree murder in violation of subdivision (a)(2) of this section; defendant received consecutive sentences totaling sixty years in prison. *Boyce-Reid v. State*, 2009 Ark. App. 576, — S.W.3d — (2009).

Where the state's witness testified that she and defendant drove to the victim's RV in order to rob the victim, defendant entered the residence, grabbed the victim's wallet, handed it to the witness, and then she heard a pop sound; a second witness testified that he had seen defendant with a handgun that day, and defendant told him that he had shot the victim in the head. After the victim was found dead, defendant was convicted of first degree felony murder in violation of subdivision (a)(1) of this section with theft as the underlying felony under § 5-36-103; because defendant did not file a motion for a directed verdict challenging the sufficiency of the evidence supporting his conviction for first degree felony murder, the issue was not preserved for review. *Lockhart v. State*, 2009 Ark. App. 587, — S.W.3d — (2009).

Evidence was sufficient to support defendant's conviction of first-degree murder for the killing of a romantic rival and to establish the requisite intent of purposefulness because it showed that defendant, while possessing a knife, drove to the victim's residence, confronted her, and stabbed her with the knife in the ensuing altercation. *Mooney v. State*, 2009 Ark. App. 622, 331 S.W.3d 588 (2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 820 (Dec. 10, 2009).

Appellant's conviction for first-degree murder in the death of his three-year-old niece was affirmed where (1) a rape kit

indicated pubic hair on the victim's genitalia, and that pubic hair was found by Y-chromosome profiling to match appellant and any of his paternally related male relatives and there was no testimony that appellant's father or his brothers had been around the victim; and (2) the medical examiner testified that the victim could not have sustained such blunt-force trauma injuries and continued to play like a normal child, that she would have become lethargic and passed out. *Smith v. State*, 2010 Ark. App. 135, 374 S.W.3d 124 (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 286 (Mar. 31, 2010).

While there was no testimony that anyone saw defendant at the scene or with a gun, evidence was sufficient to convict defendant of aggravated robbery, under § 5-12-103, and first-degree murder, under subdivision (a)(1) of this section, as it showed defendant had access to a gun, the car defendant was driving that night was at the scene, and the victim's condition suggested a robbery. *Bates v. State*, 2010 Ark. App. 417, — S.W.3d — (2010).

Trial court did not err by denying defendant's motions for a directed verdict because substantial evidence supported his conviction, as there was evidence that: (1) defendant had prior knowledge of his wife's affair with the victim and investigated the victim's background; (2) defendant waited in his truck after arriving at the store until the victim and his wife were standing by their vehicles; and (3) defendant fired multiple shots, chased the victim, and stood over him to deliver a final shot to the head. *James v. State*, 2010 Ark. 486, 372 S.W.3d 800 (2010).

Evidence was sufficient to convict defendant of first-degree murder under subdivision (a)(2) of this section, as a criminologist confirmed that gunshot residue was found on defendant's clothing, and the intent necessary for first-degree murder could be inferred from the type of weapon used and the nature and extent of the victim's wounds. *Gill v. State*, 2010 Ark. App. 524, 376 S.W.3d 529 (2010).

Trial court did not err in denying defendant's motion for a directed verdict during a trial for first-degree murder as an accomplice, in violation of subdivision (a)(2) of this section and § 5-2-403(a)(1), because a codefendant testified that defendant hired the codefendant to murder his

wife; the state presented the testimony of five witnesses concerning the fear of defendant's wife that he would kill her. *Camp v. State*, 2011 Ark. 155, 381 S.W.3d 11 (2011).

Denial of appellant's, an inmate's, petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1 was appropriate because the evidence demonstrated that he was not prejudiced by his trial counsel's failure to properly renew his motion for directed verdict at the close of all the evidence. While the inmate was unable to challenge the sufficiency of the evidence in his direct appeal, there was substantial evidence to support the verdicts, including the inmate himself admitting to hitting his wife's car from behind and then getting out of his truck and shooting her; the surviving victim testified that after falling in an attempt to run away from the scene, she looked up and saw the inmate over her smiling and holding a shotgun. *Davis v. State*, 2011 Ark. 493, — S.W.3d — (2011).

Defendant's convictions for first-degree murder and aggravated robbery, in violation of subsection (a) of this section and §§ 5-3-201 and 5-12-103(a), were supported by sufficient evidence, as the evidence showed that defendant was armed with a deadly weapon for the purpose of committing the theft of a cab driver, that defendant threatened the driver, and that the driver was shot in the struggle over the gun. *Garr v. State*, 2011 Ark. App. 509, — S.W.3d — (2011).

Evidence was sufficient to convict defendant of first-degree murder under subdivision (a)(2) of this section because the three gunshot wounds to the victim alone, at least two of which were fired 35-40 seconds apart, ran counter to defendant's accidental shooting theory; and the evidence supported an inference of purposeful intent under § 5-2-202(1). *Smith v. State*, 2012 Ark. App. 359, — S.W.3d — (2012).

Appellant's first-degree murder conviction was affirmed because there was evidence that appellant had previously discussed robbing the victim by bashing in his head, there was evidence that appellant owed the victim money and had been cut off from his supply of drugs, and there was evidence that it would be very difficult for the gun to go off accidentally. *McClard v. State*, 2012 Ark. App. 573, — S.W.3d — (2012).

Evidence was sufficient to sustain defendant's attempted first-degree murder conviction because defendant knocked on a door and fired a gun at the victim when he opened the door. The jury could reasonably have inferred that defendant purposely engaged in conduct that constituted a substantial step in a course of conduct known to cause death to another person, regardless of that person's identity. *Wells v. State*, 2012 Ark. App. 596, — S.W.3d —, 2012 Ark. App. LEXIS 718 (Oct. 24, 2012).

Evidence was sufficient to sustain a first-degree murder conviction because defendant admitted that he stabbed the victim, blood was seen on his shirt, he kept a knife in his room, he was seen going into the room, and a knife box and lid were found on the floor, implying that defendant went into the bedroom and got his knife. *Stevenson v. State*, 2013 Ark. 100, — S.W.3d — (2013).

During an inmate's trial for murder in the first degree, in violation of subdivision (a)(2) of this section, the court did not err in denying his motion for a directed verdict because there was ample evidence to support the conclusion that he purposely caused the victim's death under § 5-2-202(1); he admitted to the crime and that it was his intent to kill the victim and that he had to think about how to do it. *Kaufman v. State*, 2013 Ark. 126, — S.W.3d — (2013).

### **Furtherance or Perpetration of Felony.**

Where defendant and his accomplices fired gunshots seven or eight minutes after robbing two men, they fled in the murder victim's car to avoid being arrested. The jury was free to find that the murder occurred in the course of the aggravated robbery; therefore, the evidence was sufficient to support defendant's conviction for first-degree felony murder under this section. *Rhodes v. State*, 2009 Ark. App. 665, — S.W.3d — (2009).

### **Indictment or Information.**

In a murder case, the trial court did not err in allowing the state to amend the information on the morning of trial to include a felony-firearm enhancement. Because the charge defendant was tried for was contained in the original information, the reviewing court failed to see how



defendant was unfairly surprised or otherwise prejudiced by the amended information. *Plessy v. State*, 2012 Ark. App. 74, 388 S.W.3d 509 (2012).

### Instructions.

In addition to instructions on the elements of capital murder, the jury was instructed on lesser included offenses of first-degree murder, second-degree murder, and manslaughter, and defendant not assert that the model jury instructions inaccurately reflected the law; thus, despite his contention that his proffered instructions were more inclusive and a more clear statement of the law on the various issues, the trial court did not err in refusing to submit them to the jury in his capital murder case. *Adams v. State*, 2009 Ark. 375, 326 S.W.3d 764 (2009), rehearing denied, *Adams v. State*, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 556 (Sept. 10, 2009), cert. denied, *Adams v. Arkansas*, 559 U.S. 1021, 130 S. Ct. 1922, 176 L. Ed. 2d 392 (2010).

Petitioner was properly denied postconviction relief because the jury was instructed as to the mental state required for each of the degrees of homicide, the jury considered the evidence presented at trial, and the jury found that petitioner had the requisite mental state for a first-degree-murder conviction; petitioner's conviction meant that the jury had found that petitioner had the requisite mental state for first-degree murder. *Strain v. State*, 2012 Ark. 184, — S.W.3d — (2012).

### Intent.

Defendant convicted of first degree murder under subsection (a) of this section failed to preserve his complaint that the evidence of intent was insufficient by failing to make a motion for directed verdict at the close of the state's case and at the close of all the evidence, as required by Ark. R. Crim. P. 33.1. *Brown v. State*, 374 Ark. 324, 287 S.W.3d 587 (2008).

As defendant hit the victim (his ex-wife's mother) in the head with the baseball bat and cut the victim's throat, threatened his ex-wife, and forced her to go with him from the scene of the crime, the evidence was sufficient to convict defendant of first-degree murder, kidnapping, and terroristic threatening under subdivision (a)(2) of this section and §§ 5-11-102(a) and 5-13-301(a)(1)(A). *Alvard v.*

*State*, 2011 Ark. App. 160, — S.W.3d — (2011).

Evidence was sufficient to support a finding of intent for the purpose of first-degree murder, in violation of subdivision (a)(2) of this section, because the victim was shot at least seven times and suffered several gunshot wounds to the back and front of the body; evidence of defendant's flight immediately after the murder further supported the verdict. *Wells v. State*, 2012 Ark. App. 276, — S.W.3d — (2012).

### —Evidence.

There was sufficient evidence for the jury to determine that defendant had the requisite mens rea for first-degree murder at the time he shot and killed his wife as an expert for the state testified that defendant did not have a mental disease or defect at the time of the shooting; the jury was entitled to believe the State's expert over defendant's expert. *Davis v. State*, 368 Ark. 401, 246 S.W.3d 862 (2007).

Circuit court did not err by admitting into evidence photographs of the murder victim because her wounds were relevant to show defendant's intent to kill her; they also assisted the jury in understanding the crime-scene investigator's description of the scene, and the circuit court performed a proper evaluation of the photographs before allowing them to be presented to the jury. *Davis v. State*, 368 Ark. 401, 246 S.W.3d 862 (2007).

### Lesser Included Offenses.

Denial of postconviction relief was proper, because the petitioner failed to show the second-degree-murder instruction added an extra element not present in the greater offense of first-degree murder and that counsel should have objected; Second-degree murder was a lesser-included offense of first-degree murder, as it differed from the greater offense only to the extent that it required a lesser kind of culpable mental state. *Holloway v. State*, 2013 Ark. 140, — S.W.3d — (2013), rehearing denied, — S.W.3d —, 2013 Ark. LEXIS 231 (Ark. May 9, 2013).

### Sentence.

Because defendant was unable to show that he was prejudiced by his 40 year sentence for first-degree murder, as it was less than the maximum possible sentence for his conviction, the court did not consider his claim that his due process rights

were violated by the admission of a photographic history of the victim's life during sentencing. *Tate v. State*, 367 Ark. 576, 242 S.W.3d 254 (2006).

### Serious Physical Injury.

Sufficient evidence supported the conclusion that a defendant intended to cause serious physical harm to a victim: a witness testified that the witness gave defendant a gun, other witnesses testified that

defendant shot the victim with that gun, the victim was shot in the arm and hip, which required surgery, and the victim continued to suffer with pain and impairment as a result of the injuries. *Hawkins v. State*, 2009 Ark. App. 675, — S.W.3d — (2009).

**Cited:** *Smith v. State*, 2010 Ark. App. 216, — S.W.3d — (2010); *Holian v. State*, 2013 Ark. 7, — S.W.3d —, 2013 Ark. LEXIS 11 (Jan. 17, 2013).

## 5-10-103. Murder in the second degree.

### RESEARCH REFERENCES

**ALR.** Sufficiency of Evidence to Support Homicide Conviction Where No Body Was Produced. 65 A.L.R.6th 359.

**Ark. L. Rev.** Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

### CASE NOTES

#### ANALYSIS

Evidence.  
Felony Murder.  
Instructions.  
Intent.  
Lesser Included Offenses.

#### Evidence.

There was substantial evidence to support defendant's conviction for the second degree murder of his wife. Given the extent of the wife's injuries and the location of those injuries, the jury could reasonably infer that defendant acted either under circumstances manifesting extreme indifference to the value of human life or with the purpose of causing serious physical injury to his wife. *Wyles v. State*, 368 Ark. 646, 249 S.W.3d 782 (2007).

In a second-degree murder case under this section, defendant's rights under the federal and state Confrontation Clauses were violated by the admission of an incriminating testimonial statement made by defendant's sister relating to his motive and statement of mind; although the sister was unavailable, defendant did not have an opportunity for cross-examination. Moreover, the statement was not offered for a non-hearsay purpose, and the admission of such was not harmless. *Seaton v. State*, 101 Ark. App. 201, 272 S.W.3d 854 (2008).

Where defendant took a loaded gun from his vehicle after seeing the victim's

group outside a department store and deliberately shot the victim three times at close range, the jury could infer that he knowingly caused the victim's death; the trial court did not abuse its discretion by admitting defendant's statement that he shot the victim, because he wanted to give him an early Christmas present. The statement was probative of defendant's state of mind as well as his lack of remorse; because the evidence was sufficient to support defendant's conviction for second degree murder in violation of subdivision (a)(1) of this section, the trial court did not err by denying his motion for a directed verdict. *Vorachith v. State*, 2009 Ark. App. 656, — S.W.3d — (2009).

There was sufficient evidence that defendant killed a victim in the course and furtherance of a robbery and there was a nexus between the murder and the robbery where after striking both victims, defendant grabbed the robbery victim and demanded money. *Norris v. State*, 2010 Ark. 174, 368 S.W.3d 52 (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 292 (May 20, 2010).

Defendant's conviction for murder in the second degree in violation of subdivision (a)(1) of this section, with a firearm enhancement, was proper because defendant acted knowingly to cause the victim's death under circumstances manifesting extreme indifference to the value of human life. The issues involved credibility



and it was presumed that a person intended the natural and probable consequences of his or her acts; defendant shot her husband in the wrist with a handgun, he bled to death as a result of the wound, and additional evidence indicated that the fatal wound was defensive in nature. *Johnson v. State*, 2010 Ark. App. 153, 375 S.W.3d 12 (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 257 (May 6, 2010).

Defendant's conviction for the second-degree murder of his wife, in violation of subsection (a) of this section, was supported by the evidence because an accident-reconstruction expert testified that the wife's car sustained body damage consistent with it being pushed into the water by defendant's all-terrain vehicle; a medical examiner concluded that she did not drown because she was already deceased before her body entered the water. *Holloway v. State*, 2010 Ark. App. 767, 379 S.W.3d 696 (2010), review denied, — S.W.3d —, 2011 Ark. LEXIS 381 (Ark. Jan. 6, 2011).

Appellant's conviction for second-degree murder was affirmed because the pattern of the gunshots, which were aimed at the victim's chest and upper-arm area, as well as the trajectory of the bullets showed that appellant acted deliberately in a manner that would naturally and probably culminate in the victim's death. *Phillips v. State*, 2011 Ark. App. 575, 386 S.W.3d 99 (2011).

In reviewing the evidence to support appellant's second-degree murder conviction, the court would not consider a 911 call because the record did not contain a verbatim record of the call as the jury heard it and because the call was not properly abstracted. *Rainer v. State*, 2012 Ark. App. 588, — S.W.3d —, 2012 Ark. App. LEXIS 715 (Oct. 24, 2012).

Evidence was sufficient to affirm the finding that appellant caused the victim's death with the purpose of causing her serious physical injury, and thus appellant's second-degree murder conviction was affirmed; there were many signs of a fight, including blood spatters and a trail of blood, appellant's thumbprint was on the murder weapon, the location of the victim's wound was not consistent with a fall, and the victim called for help, not appellant. *Rainer v. State*, 2012 Ark. App.

588, — S.W.3d —, 2012 Ark. App. LEXIS 715 (Oct. 24, 2012).

### **Felony Murder.**

Where defendant and his accomplices fired gunshots seven or eight minutes after robbing two men, they fled in the murder victim's car to avoid being arrested. The jury was free to find that the murder occurred in the course of the aggravated robbery committed in violation of this section; therefore, the evidence was sufficient to support defendant's conviction for first-degree felony murder under § 5-10-102. *Rhodes v. State*, 2009 Ark. App. 665, — S.W.3d — (2009).

### **Instructions.**

In addition to instructions on the elements of capital murder, the jury was instructed on lesser included offenses of first-degree murder, second-degree murder, and manslaughter, and defendant not assert that the model jury instructions inaccurately reflected the law; thus, despite his contention that his proffered instructions were more inclusive and a more clear statement of the law on the various issues, the trial court did not err in refusing to submit them to the jury in his capital murder case. *Adams v. State*, 2009 Ark. 375, 326 S.W.3d 764 (2009), rehearing denied, *Adams v. State*, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 556 (Sept. 10, 2009), cert. denied, *Adams v. Arkansas*, 559 U.S. 1021, 130 S. Ct. 1922, 176 L. Ed. 2d 392 (2010).

### **Intent.**

In a case in which defendant was convicted of the second degree murder of his wife, the jury could infer defendant's guilt from his efforts to conceal the crime from the authorities and his family and friends. Defendant concealed the killing of his wife by burying her, covering her grave with a barrel and sod, and storing her personal belongings in his storage unit. *Wyles v. State*, 368 Ark. 646, 249 S.W.3d 782 (2007).

### **Lesser Included Offenses.**

Aggravated robbery is not a lesser included offense of attempted capital murder because, while an aggravated-robbery charge shares the intent to rob with attempted capital murder, aggravated robbery also requires one of three other elements. Two of those elements, being

armed with a deadly weapon, or representing as such, are unique to aggravated robbery, and the third possible element of aggravated robbery is having inflicted or attempted to inflict death or serious physical injury upon another, which is not equivalent to the element in attempted capital murder that a defendant, in the course of or in flight from such robbery, caused the death of a person under circumstances manifesting extreme indifference to the value of human life. *Clark v. State*, 373 Ark. 161, 282 S.W.3d 801 (2008).

Prohibition against double jeopardy was not violated when defendant was convicted of aggravated robbery and attempted capital murder because the robbery was the underlying felony, and

aggravated robbery was not the lesser included offense of attempted capital murder. *Clark v. State*, 373 Ark. 161, 282 S.W.3d 801 (2008).

Denial of postconviction relief was proper, because the petitioner failed to show the second-degree-murder instruction added an extra element not present in the greater offense of first-degree murder and that counsel should have objected; Second-degree murder was a lesser-included offense of first-degree murder, as it differed from the greater offense only to the extent that it required a lesser kind of culpable mental state. *Holloway v. State*, 2013 Ark. 140, — S.W.3d — (2013), rehearing denied, — S.W.3d —, 2013 Ark. LEXIS 231 (Ark. May 9, 2013).

### 5-10-104. Manslaughter.

(a) A person commits manslaughter if:

(1)(A) The person causes the death of another person under circumstances that would be murder, except that he or she causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse.

(B) The reasonableness of the excuse is determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believed them to be;

(2) The person purposely causes or aids another person to commit suicide;

(3) The person recklessly causes the death of another person; or

(4) Acting alone or with one (1) or more persons:

(A) The person commits or attempts to commit a felony; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony:

(i) The person or an accomplice negligently causes the death of any person; or

(ii) Another person who is resisting the felony or flight causes the death of any person.

(b) It is an affirmative defense to any prosecution under subsection (a)(4) of this section for an offense in which the defendant was not the only participant that the defendant:

(1) Did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid the homicidal act's commission;

(2) Was not armed with a deadly weapon;

(3) Reasonably believed that no other participant was armed with a deadly weapon; and

(4) Reasonably believed that no other participant intended to engage in conduct which could result in death or serious physical injury.

(c) Manslaughter is a Class C felony.



**History.** Acts 1975, No. 280, § 1504; A.S.A. 1947, § 41-1504; Acts 2007, No. 827, § 21.

RESEARCH REFERENCES

**Ark. L. Rev.** Recent Development: Arkansas Criminal Law — Felony Manslaughter as a Lesser-Included Offense, 60 Ark. L. Rev. 1017.

**U. Ark. Little Rock L. Rev.** Annual Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

CASE NOTES

ANALYSIS

Evidence.  
Extreme Emotional Disturbance.  
Instructions.  
Lesser Included Offenses.  
Provocation, Justification, Etc.  
Reckless Driving.  
Underlying Felonies.

**Evidence.**

Evidence was sufficient to sustain defendant's convictions for manslaughter because two people in a motor home were killed when defendant drove a fully loaded commercial vehicle weighing over 82,000 pounds, while under the influence of methamphetamine, into the oncoming-traffic lane, striking the motor home, and ultimately driving through it. Defendant never attempted to brake prior to the accident or to return to the proper lane of traffic. *Hoyle v. State*, 371 Ark. 495, 268 S.W.3d 313 (2007), rehearing denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 12 (Jan. 10, 2008).

Trial court did not err in convicting defendant of manslaughter in violation of subdivision (a)(3) of this section because the state presented sufficient evidence to corroborate defendant's confession since the corpus delicti rule, § 16-89-111(d), required a showing that the crime occurred, and the state made the requisite showing; the evidence showed that the victim died hours after defendant admittedly went to his apartment, that the victim's apartment was in a state of disarray, which could have been interpreted as circumstantial evidence of a struggle, that blood was found in an area not in the immediate vicinity of where the victim ultimately passed away, and that the medical examiner would have ruled the victim's death a

homicide had he known that he had been punched in the head five times. *Freeman v. State*, 2010 Ark. App. 90, — S.W.3d — (2010).

Appellant's conviction for manslaughter was affirmed because while a no-knock, nighttime search warrant was executed at appellant's apartment, shots were fired as soon as the SWAT team hit the door, the police returned fire, two police officers were shot, and two persons inside the residence were shot. *Porter v. State*, 2012 Ark. App. 139, — S.W.3d — (2012).

**Extreme Emotional Disturbance.**

Where the evidence at defendant's murder trial showed defendant drove up to the victim's house, the victim approached the car and the two spoke briefly, defendant pulled out a gun, the victim began backing away, and defendant shot and killed the victim, the trial court did not err in refusing to instruct the jury on the lesser-included offense of manslaughter because the facts failed to demonstrate an extreme emotional disturbance for which there was a reasonable excuse; although defendant testified that statements made by the victim on a prior occasion and the victim's failure to run when defendant pulled out his gun led him to believe that the victim was armed, the evidence showed that defendant was the one who approached the victim and that their initial contact was a mere exchange of words in normal voices. Defendant's perceived threat in this situation did not provide a reasonable excuse for him to shoot the victim under a claim of extreme emotional disturbance because it was clear that defendant was free to drive away at any time; further, the victim was backing away from the car when defendant began to shoot, and he was unarmed. *Taylor v.*

State, 2009 Ark. App. 627, 331 S.W.3d 597 (2009).

### **Instructions.**

Defendant's capital-murder conviction was appropriate and there was no basis for giving the jury defendant's requested manslaughter instruction, per subdivision (a)(1) of this section. Although defendant argued that there was evidence that he was provoked to shoot the victim, defendant pointed to no evidence that the victim's actions in fighting defendant's brother were calculated to provoke defendant to take action. *Jackson v. State*, 375 Ark. 321, 290 S.W.3d 574 (2009), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 440 (Feb. 12, 2009).

In addition to instructions on the elements of capital murder, the jury was instructed on lesser included offenses of first-degree murder, second-degree murder, and manslaughter, and defendant not assert that the model jury instructions inaccurately reflected the law; thus, despite his contention that his proffered instructions were more inclusive and a more clear statement of the law on the various issues, the trial court did not err in refusing to submit them to the jury in his capital murder case. *Adams v. State*, 2009 Ark. 375, 326 S.W.3d 764 (2009), rehearing denied, *Adams v. State*, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 556 (Sept. 10, 2009), cert. denied, *Adams v. Arkansas*, 559 U.S. 1021, 130 S. Ct. 1922, 176 L. Ed. 2d 392 (2010).

Trial court did not err in refusing to instruct the jury on manslaughter as a lesser included offense of first-degree murder because there was no evidence that the victim actually threatened defendant with a gun at the time of the murder and because the only testimony of threats made by the victim against defendant came from defendant's own testimony; even if the court were to accept defendant's self-serving testimony as evidence to support a manslaughter instruction, the threats as testified to by defendant did not provide a basis for the manslaughter instruction because mere threats, where the person making the threats was unarmed and was neither committing nor attempting to commit violence on defendant the time of the killing, were insufficient to lessen defendant's culpability for murder. Where there was no evidence that

the victim was armed and no evidence that he was violently assaulting defendant when defendant shot him, defendant failed to establish provocation sufficient to justify his actions; defendant was thus not entitled to a jury instruction on the lesser-included offense of manslaughter. *Pollard v. State*, 2009 Ark. 434, 336 S.W.3d 866 (2009).

### **Lesser Included Offenses.**

Circuit court erred in instructing the jury on felony manslaughter as a lesser included offense of capital felony murder, because the "extreme indifference" element was not a culpable mental state relating to a specific homicide victim but merely described the dangerous circumstances generally set in motion by defendant, and since the "extreme indifference" standard was not a mens rea related to a specific victim, it could not support a lesser included offense based on a less culpable mental state; the sole mens rea element in capital felony murder and first degree felony murder related to the underlying felony and not to the homicide itself. *Perry v. State*, 371 Ark. 170, 264 S.W.3d 498 (2007).

Defendant's convictions for manslaughter, in violation of subdivision (a)(3) of this section, were modified to the lesser-included offense of negligent homicide under § 5-10-105(b)(1) because defendant's acts of crossing the center line, tailgating, and averting defendant's eyes from the road constituted negligence, not recklessness under § 5-2-202(3). *Rollins v. State*, 2009 Ark. App. 110, 302 S.W.3d 617 (2009), rev'd, 2009 Ark. 484, 347 S.W.3d 20 (2009).

In a case in which a jury convicted defendant of capital murder in the shooting death of his ex-wife, the trial court properly refused to instruct the jury on reckless manslaughter and negligent homicide. Defendant, who fired once into a residence, mortally striking his ex-wife in the back, offered no rational basis to support giving either instruction on the basis that his actions were reckless or negligent. *Jones v. State*, 2012 Ark. 38, 388 S.W.3d 411 (2012).

### **Provocation, Justification, Etc.**

During defendant's trial for attempted murder, the court did not err in refusing to instruct the jury on the lesser-included



offense of attempted extreme-emotional-disturbance manslaughter, in violation of subdivision (a)(1)(A) of this section and § 5-3-201(b), because defendant's self-serving testimony was the only evidence of provocation presented; the evidence corroborated the victim's testimony that defendant stabbed the victim with a knife. *Townsell v. State*, 2010 Ark. App. 754, — S.W.3d — (2010).

### Reckless Driving.

Evidence was sufficient to support defendant's convictions of two counts manslaughter stemming from a head-on collision in which two people were killed because it showed that defendant had been driving erratically prior to the crash, had tailgated another driver for 15 miles, drove fast on a curving highway, and crossed over the center line while looking over his shoulder. There was further testimony establishing that defendant did not attempt to stop or swerve as he drove headfirst into the victims' vehicle, and additional proof was presented from which the jury could infer that, at some point within the eight hours proceeding the drawing of defendant's blood four hours after the accident, defendant had ingested cocaine. *Rollins v. State*, 2009 Ark. 484, 347 S.W.3d 20 (2009).

Substantial evidence supported defendant's manslaughter convictions under subdivision (a)(3) of this section and § 5-2-202(3) given defendant's ingestion of 11

controlled substances prior to driving her SUV across the center line, running two vehicles off the road before striking the victims' car, which had pulled onto the shoulder. *Dail v. State*, 2013 Ark. App. 184, — S.W.3d — (2013).

### Underlying Felonies.

In a fleeing and manslaughter case where an officer died during a high speed pursuit of defendant, who fled from a store after stealing candy, the trial court did not err by submitting a manslaughter instruction as fleeing under § 5-54-125 was an appropriate underlying felony to support a conviction under this section. *Fondren v. State*, 364 Ark. 498, 221 S.W.3d 333 (2006).

During defendant's trial, the court properly gave an instruction to the jury regarding manslaughter, in violation of subdivision (4)(A) of this section, after an officer was killed in a high-speed chase because while the manslaughter charge might have arisen from the same events as felony fleeing, in violation of § 5-54-125, the legislature clearly intended that fleeing be punishable as a separate offense. *Fondren v. State*, 364 Ark. 498, 221 S.W.3d 333 (2006).

Any felony will support a conviction for manslaughter. *Fondren v. State*, 364 Ark. 498, 221 S.W.3d 333 (2006).

**Cited:** *Holian v. State*, 2013 Ark. 7, — S.W.3d —, 2013 Ark. LEXIS 11 (Jan. 17, 2013).

## 5-10-105. Negligent homicide.

(a)(1) A person commits negligent homicide if he or she negligently causes the death of another person, not constituting murder or manslaughter, as a result of operating a vehicle, an aircraft, or a watercraft:

(A) While intoxicated;

(B)(i) If at that time there is an alcohol concentration of eight hundredths (0.08) or more in the person's breath or blood based upon the definition of alcohol concentration in § 5-65-204, as determined by a chemical test of the person's blood, urine, breath, saliva, or other bodily substance.

(ii) The method of the chemical test of the person's blood, urine, saliva, breath, or other bodily substance shall be made in accordance with §§ 5-65-204 and 5-65-206;

(C) While passing a stopped school bus in violation of § 27-51-1004; or

(D) While fatigued.

(2) A person who violates subdivision (a)(1) of this section upon conviction is guilty of a Class B felony.

(b)(1) A person commits negligent homicide if he or she negligently causes the death of another person.

(2) A person who violates subdivision (b)(1) of this section upon conviction is guilty of a Class A misdemeanor.

(c) As used in this section:

(1) “Fatigued” means:

(A) Having been without sleep for a period of twenty-four (24) consecutive hours; or

(B) Having been without sleep for a period of twenty-four (24) consecutive hours and in the state of being asleep; and

(2) “Intoxicated” means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or an intoxicant to such a degree that the operator’s reactions, motor skills, and judgment are substantially altered and the operator therefore constitutes a clear and substantial danger of physical injury or death to himself or herself or to another person.

**History.** Acts 1975, No. 280, § 1505; A.S.A. 1947, § 41-1505; Acts 1987, No. 538, § 1; 1999, No. 1112, § 1; 2001, No. 561, § 1; 2005, No. 1004, § 1; 2005, No. 2128, § 2; 2009, No. 650, § 1; 2013, No. 361, § 1; 2013, No. 1296, § 1.

**Amendments.** The 2009 amendment inserted “or” at the end of (a)(1)(A), and substituted “Class B” for “Class C” in (a)(2).

The 2013 amendment by No. 361, in (a)(1)(B)(i), substituted “alcohol” for

“breath, blood, and urine” and inserted “saliva”; and, in (a)(1)(B)(ii), substituted “the chemical test” for “chemical analysis” and “saliva, breath, or other bodily substance” for “breath.”

The 2013 amendment by No. 1296 inserted (a)(1)(D); inserted “upon conviction” in (a)(2) and (b)(2); inserted (c)(1); and, in (c)(2), substituted “operator” for “driver” twice and substituted “or to another person” for “and other motorists or pedestrians.”

## CASE NOTES

### ANALYSIS

Evidence.

Expungement.

Instructions.

Intoxication.

Murder or Manslaughter.

Preservation for Review.

### Evidence.

Evidence was sufficient to support defendant’s conviction of negligent homicide where the jury could conclude that defendant’s failure to perceive the risk under the facts constituted a gross deviation from the standard of care that a reasonable person would observe in defendant’s position. *Utley v. State*, 366 Ark. 514, 237 S.W.3d 27 (2006).

Defendant’s convictions for manslaughter, in violation of § 5-10-104(a)(3), were modified to the lesser-included offense of negligent homicide under subdivision (b)(1) of this section because defendant’s acts of crossing the center line, tailgating, and averting defendant’s eyes from the road constituted negligence, not recklessness under § 5-2-202(3). *Rollins v. State*, 2009 Ark. App. 110, 302 S.W.3d 617 (2009), rev’d, 2009 Ark. 484, 347 S.W.3d 20 (2009).

Appellants’ convictions for negligent homicide in the death of their daughter were affirmed; given the record—which included appellants allowing three hours to pass without checking on or knowing the whereabouts of their twenty-two-month-old child—the instant court could not say



that the verdicts were not supported by substantial evidence. *Marin v. State*, 2009 Ark. App. 802, — S.W.3d — (2009).

### **Expungement.**

Circuit court erred by sealing the applicant's conviction for negligent-homicide pursuant to this section, because given the plain meaning of this section, the statute lacked any provision for expungement. *State v. Martin*, 2012 Ark. 191, — S.W.3d — (2012).

### **Instructions.**

There was no abuse of discretion in a trial court's refusal of defendant's proffered negligent homicide jury instruction because there was no rational basis for the instruction where defendant swung a two-by-four hard at the victim's head and there was no evidence that defendant was unaware that such conduct, or the risk of such conduct, would result in the victim's death. *Norris v. State*, 2010 Ark. 174, 368 S.W.3d 52 (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 292 (May 20, 2010).

In a case in which a jury convicted defendant of capital murder in the shooting death of his ex-wife, the trial court properly refused to instruct the jury on reckless manslaughter and negligent homicide. Defendant, who fired once into a residence, mortally striking his ex-wife in the back, offered no rational basis to support giving either instruction on the basis that his actions were reckless or negligent. *Jones v. State*, 2012 Ark. 38, 388 S.W.3d 411 (2012).

Because there was no negligent behavior on the part of defendant pursuant to § 5-2-202(4), his action were purposeful, and a firearm and toolmark examiner for the Arkansas State Crime Lab testified that for the gun to be fired, the trigger had to be pulled, which usually required five to five and a half pounds of pressure, the trial court did not err in refusing to give the jury an instruction on negligent homicide under subdivision (b)(1) of this section. *Ratterree v. State*, 2012 Ark. App. 701, — S.W.3d —, 2012 Ark. App. LEXIS 821 (Dec. 12, 2012).

### **Intoxication.**

Although the circuit court erred in allowing the results of defendant's blood-alcohol test into evidence since the state failed to provide evidence that the blood

was drawn by a physician or a person acting under the direction and supervision of a physician as required by § 5-65-204, defendant was properly convicted of negligent homicide in violation of this section and aggravated assault in violation of § 5-13-204 because there was overwhelming evidence of defendant's intoxication; while the only evidence regarding the concentration of alcohol in defendant's blood came from the blood test, there was sufficient evidence at trial to support defendant's conviction on the alternative theory that defendant negligently caused the victim's death as a result of operation of a motor vehicle while intoxicated. *Bates v. State*, 2011 Ark. App. 446, 384 S.W.3d 654 (2011).

In a case in which defendant was convicted of negligent homicide under subdivision (a)(1)(a) of this section, there was substantial evidence that defendant was intoxicated at the time of the accident where: (1) defendant admitted at trial that he had smoked marijuana earlier in the day of the accident and that he had ingested a pill and a half of Xanax shortly before the accident occurred; (2) the driver of a tractor-trailer rig testified that defendant's vehicle veered into his lane and narrowly missed his vehicle and that he saw defendant continue on the wrong side of the road for approximately three-fourths of a mile, without correcting, before striking the victims' vehicles; and (3) another driver testified that he drove off the shoulder of the road to avoid defendant's vehicle and that, when defendant passed him, defendant was leaning against the driver-side door of his vehicle and appeared to be asleep. *Ross v. State*, 2012 Ark. App. 243, — S.W.3d — (2012).

### **Murder or Manslaughter.**

In defendant's trial for criminally negligent homicide, the trial court erred in failing to grant defendant's motion for directed verdict where the state's evidence that defendant's truck merely crossed the center line of a road was insufficient to support a finding of criminal negligence; this was a different standard from the evidence needed to support a finding of civil negligence. *Utley v. State*, 93 Ark. App. 381, 219 S.W.3d 709 (2005), rev'd, 366 Ark. 514, 237 S.W.3d 27 (2006).

### **Preservation for Review.**

Defendant's conviction for negligent homicide was appropriate because she failed

to preserve for appellate review her contention that the judge erred in finding that she engaged in criminally negligent conduct and that the conduct caused the death of the pedestrian victim because the evidence was insufficient to support the conviction. Even though defendant's counsel made a specific argument to the judge, he never asked for dismissal but argued

instead that the state had not met its burden of proving negligence, causation, beyond a reasonable doubt; the reasonable-doubt language was associated with a closing argument and not a motion to dismiss under Ark. R. Crim. P. 33.1, where substantial evidence was the test. *Grube v. State*, 2010 Ark. 171, 368 S.W.3d 58 (2010).

### **5-10-106. Physician-assisted suicide.**

(a)(1) As used in this section, "physician-assisted suicide" means a physician or health care provider participating in a medical procedure or knowingly prescribing any drug, compound, or substance for the express purpose of assisting a patient to intentionally end the patient's life.

(2) However, "physician-assisted suicide" does not apply to a person participating in the execution of a person sentenced by a court to death by lethal injection.

(b) It is unlawful for any physician or health care provider to commit the offense of physician-assisted suicide by:

(1) Prescribing any drug, compound, or substance to a patient with the express purpose of assisting the patient to intentionally end the patient's life; or

(2) Assisting in any medical procedure for the express purpose of assisting a patient to intentionally end the patient's life.

(c) Upon conviction, any physician or health care provider violating subsection (b) of this section is guilty of a Class C felony.

(d) Nothing in this section prohibits a:

(1) Physician or health care provider from carrying out an advanced directive or living will; or

(2) Physician from prescribing any drug, compound, or substance for the specific purpose of pain relief.

**History.** Acts 1999, No. 394, § 1; 2007, No. 827, §§ 22, 23.

## **CHAPTER 11**

### **KIDNAPPING AND RELATED OFFENSES**

#### **SECTION.**

5-11-101. Definitions.

5-11-108. [Repealed.]

### **5-11-101. Definitions.**

As used in this chapter:

(1) "Deviate sexual activity" means any act of sexual gratification involving:



(A) The penetration, however slight, of the anus or mouth of a person by the penis of another person; or

(B) The penetration, however slight, of the labia majora or anus of a person by any body member or foreign instrument manipulated by another person;

(2)(A) "Incompetent" means that a person is unable to care for himself or herself because of physical or mental disease or defect.

(B) The status embraced by "incompetent" may or may not exist regardless of any adjudication concerning incompetency;

(3) "Restraint without consent" includes:

(A) Restraint by physical force, threat, or deception; or

(B) In the case of a person who is under fourteen (14) years of age or incompetent, restraint without the consent of a parent, guardian, or other person responsible for general supervision of his or her welfare;

(4) "Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female;

(5) "Sexual intercourse" means penetration, however slight, of the labia majora by a penis; and

(6) "Vehicle" means any craft or device designed for the transportation of a person or property across land or water or through the air.

**History.** Acts 1975, No. 280, § 1701; 1977, No. 360, § 5; A.S.A. 1947, § 41-1701; Acts 2007, No. 827, §§ 24, 25.

## CASE NOTES

### ANALYSIS

**Jurisdiction.**

**Restraint Without Consent.**

**Jurisdiction.**

Defendant's contention that the evidence was insufficient to prove that the murder took place in Arkansas was rejected as, although evidence showed that the victim's body was found in Oklahoma, and there was no positive evidence presented that the crime actually occurred outside of Arkansas; the record provided ample substantial evidence that, at the very least, the premeditation and deliberation element of capital murder and kidnapping by deception occurred in Arkansas. *Smith v. State*, 367 Ark. 274, 239 S.W.3d 494 (2006).

**Restraint Without Consent.**

Evidence was sufficient to sustain defendant's kidnapping conviction as the 13 year old victim's mother relied upon the

representation that defendant was taking the victim to the movies with his daughter when she gave permission for the victim to leave her home with defendant; the victim's mother did not consent to defendant escorting her daughter to a motel room under the guise of meeting someone briefly before meeting her daughter at the movies. *Mitchem v. State*, 96 Ark. App. 78, 238 S.W.3d 623 (2006).

Record disclosed that defendant disabled the rape victim's vehicle, hoisted her out of the vehicle, and dragged her into the house; when the victim attempted to escape by running outside, defendant forcibly pulled her back inside the house. While being dragged to the bedroom the victim tried to hang onto door frames, but defendant overcame those efforts as well; therefore, the Court of Appeals of Arkansas held that substantial evidence supported defendant's conviction for kidnapping under § 5-11-102(a)(5) because he restrained the victim for purposes of sub-

division (3) of this section. *Henson v. State*, 2009 Ark. App. 464, 320 S.W.3d 19 (2009).

There was sufficient evidence to support appellant's conviction for kidnapping; appellant substantially interfered with the victim's liberty interest by physically threatening her and impeding her egress from the home. The victim voiced her decision that she was leaving, thus expressing her intention and revoking her consent to remain at appellant's home; appellant then stood up, slammed the door telling the victim that she was not going anywhere and told her to go to his bedroom and when the victim refused,

appellant slapped her and told her that he had a .380 pistol and would kill her if she said anything. *Hickey v. State*, 2010 Ark. 109, — S.W.3d — (2010).

Counsel was not ineffective for failing to move for a directed verdict on the issue of the amount of restraint used to commit a kidnapping because the state presented substantial evidence that defendant used deception to restrain the victim under subdivision (3)(A) of this section; defendant told the victim he was a police officer and showed her a badge, which constituted deception. *Prater v. State*, 2012 Ark. 164, — S.W.3d — (2012).

## 5-11-102. Kidnapping.

### CASE NOTES

#### ANALYSIS

Conspiracy.  
Elements of Offense.  
Evidence.  
Indictment or Information.  
Jurisdiction.  
Lesser Included Offenses.  
Restraint.  
Sentencing.  
Voluntary Release of Victim.

#### Conspiracy.

Defendant committed an overt act in furtherance of a conspiracy to commit kidnapping, aggravated robbery, theft of property, and aggravated residential burglary because he took another person to his residence and showed the person the inside of the premises, discussed how to break in the residence and how to subdue his wife, and identified the property to be taken from the residence. *Winkler v. State*, 2012 Ark. App. 704, — S.W.3d —, 2012 Ark. App. LEXIS 825 (Dec. 12, 2012).

#### Elements of Offense.

Argument that there was insufficient evidence to support a kidnapping conviction based on a lack of evidence on the element of restraint without consent was not preserved for appellate review because a motion for the directed verdict before the trial court did not raise this issue. *Davis v. State*, 365 Ark. 634, 232 S.W.3d 476 (2006).

Evidence was sufficient to sustain defendant's conviction for kidnapping where

the evidence showed that defendant picked the victim up by her waist and carried her away; defendant's purpose was clearly to cause physical injury or to terrorize. *Davis v. State*, 368 Ark. 380, 368 Ark. 351, 246 S.W.3d 433 (2007).

In the death-row inmate's capital murder trial, the pecuniary gain statutory aggravating factor did not unconstitutionally fail to narrow the class of death-eligible offenders on the ground that it merely duplicated an element of the underlying crime of felony murder during the course of a robbery, because the jury in the inmate's case was not instructed that the felony underlying the charge of capital murder was robbery; rather, the jury was instructed that the underlying felony was kidnapping, pursuant to § 5-10-101(a)(1)(iii), and that, consistent with the statutory definition of kidnapping under subdivisions (a)(3)-(5) of this section, it had to find that the inmate had restrained the victim with the purpose of inflicting physical injury upon her or engaging in sexual intercourse or sexual contact, or of committing aggravated robbery or any flight thereafter. After convicting the inmate of capital murder, the jury found in the penalty phase that he committed the murder for pecuniary gain, consistent with § 5-4-604(6); thus, there was no duplication of constitutional dimension or otherwise. *Williams v. Norris*, 576 F.3d 850 (8th Cir. 2009).



**Evidence.**

Evidence was sufficient to corroborate an accomplice's testimony and sustain defendant's capital murder and kidnapping convictions where the victim stole defendant's marijuana plants, defendant received a call shortly after the murders to go and help his son clean up a mess and defendant's nephew testified that defendant approached him and told him that if he ever said anything about the victim he would get hurt. *Green v. State*, 365 Ark. 478, 231 S.W.3d 638 (2006).

Evidence was sufficient to sustain defendant's kidnapping conviction as the 13 year old victim's mother relied upon the representation that defendant was taking the victim to the movies with his daughter when she gave permission for the victim to leave her home with defendant; the victim's mother did not consent to defendant escorting her daughter to a motel room under the guise of meeting someone briefly before meeting her daughter at the movies. *Mitchem v. State*, 96 Ark. App. 78, 238 S.W.3d 623 (2006).

Trial court did not err in sustaining state's objection that the terms of the civil dispute regarding a loan and the collateral for the loan were irrelevant and in refusing to permit defendant to question the victim concerning the property that had been collateral for the loan because, even if the victim had lied regarding the terms of the loan, that would be no defense to the crimes for which he was convicted, which included kidnapping, terroristic threatening, and aggravated assault. *Tarpley v. State*, 97 Ark. App. 122, 245 S.W.3d 192 (2006).

Offense of terroristic threatening required no more than the communication of a threat, by word or deed, with the purpose of terrorizing the victim, and the offense of aggravated assault was accomplished when defendant displayed the gun and pointed it at the victim; given the testimony that defendant kept the doorway blocked for several minutes after performing those acts and that the victim was prevented from summoning assistance during that time, the evidence was sufficient to sustain the kidnapping conviction. *Tarpley v. State*, 97 Ark. App. 122, 245 S.W.3d 192 (2006).

Evidence was sufficient to sustain defendant's kidnapping conviction where defendant's accomplice testified that defen-

dant killed the victim, and an officer testified that defendant stated that the accomplice attacked the victim, knocked him down, taped him in a chair, and that the victim was "moaning" and "in a bad way" before he died; although there was a discrepancy as to which individual attacked the victim, both statements pointed to defendant's involvement in the victim's murder. *Holsombach v. State*, 368 Ark. 415, 246 S.W.3d 871 (2007).

Circuit court did not err by admitting into evidence a recording of the kidnapping victim's 911 call as the evidence contained in the recording was relevant to prove the restraint element of the kidnapping offense and to counter defendant's argument that he released the victim; in the call, the victim told the operator the circumstances of the crimes and that she was bound and could not escape, and defendant did not produce any authority to support his position that the 911 recording was unduly prejudicial because the victim's voice was hysterical. *Davis v. State*, 368 Ark. 401, 246 S.W.3d 862 (2007).

Defendant's convictions for two counts of capital murder in violation of § 5-10-101(a)(4) and two counts of kidnapping in violation of subsection (a) of this section were appropriate, in part because evidence that defendant possessed a gun similar to that used in the murder was independently relevant proof on the issue of defendant's identity. Moreover, its probative value was not substantially outweighed by the danger of unfair prejudice. *Gilcrease v. State*, 2009 Ark. 298, 318 S.W.3d 70 (2009).

Record disclosed that defendant disabled the rape victim's vehicle, hoisted her out of the vehicle, dragged her into the house, forcibly pulled her back inside the house when the victim attempted to escape, dragged to into the bedroom while the victim tried to hang onto the door frames and forced her to have sexual relations with him; the victim escaped on her own, and defendant did not release her. The Court of Appeals of Arkansas held that substantial evidence supported defendant's conviction for kidnapping under subdivision (a)(5) of this section. *Henson v. State*, 2009 Ark. App. 464, 320 S.W.3d 19 (2009).

There was sufficient evidence to support appellant's conviction for kidnapping; ap-

pellant substantially interfered with the victim's liberty interest by physically threatening her and impeding her egress from the home. The victim voiced her decision that she was leaving, thus expressing her intention and revoking her consent to remain at appellant's home; appellant then stood up, slammed the door telling the victim that she was not going anywhere and told her to go to his bedroom and when the victim refused, appellant slapped her and told her that he had a .380 pistol and would kill her if she said anything. *Hickey v. State*, 2010 Ark. 109, — S.W.3d — (2010).

As defendant hit the victim (his ex-wife's mother) in the head with the baseball bat and cut the victim's throat, threatened his ex-wife, and forced her to go with him from the scene of the crime, the evidence was sufficient to convict defendant of first-degree murder, kidnapping, and terroristic threatening under subsection (a) of this section and §§ 5-10-102(a)(2) and 5-13-301(a)(1)(A). *Alvard v. State*, 2011 Ark. App. 160, — S.W.3d — (2011).

### **Indictment or Information.**

State was not erroneously allowed to amend the information charging appellant with three counts of kidnapping based on subdivision (a)(4) of this section after his trial was underway because the additional allegations under subdivisions (a)(3) and (6) of this section in the amended information did not change the nature of the original kidnapping charge, but amended the manner in which the kidnapping took place. Furthermore, appellant was not unfairly surprised by the amendment since a review of the testimony made it clear that he inquired into whether his victims felt terrorized by his actions. *Hill v. State*, 370 Ark. 102, 257 S.W.3d 534 (2007), appeal dismissed, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 54 (Jan. 24, 2008).

### **Jurisdiction.**

Defendant's contention that the evidence was insufficient to prove that the murder took place in Arkansas was rejected as, although evidence showed that the victim's body was found in Oklahoma, and there was no positive evidence presented that the crime actually occurred outside of Arkansas; the record provided

ample substantial evidence that, at the very least, the premeditation and deliberation element of capital murder and kidnapping by deception occurred in Arkansas. *Smith v. State*, 367 Ark. 274, 239 S.W.3d 494 (2006).

### **Lesser Included Offenses.**

Second-degree false imprisonment is not a lesser included offense of kidnapping; thus, instruction on second-degree or first-degree false imprisonment was not required in a kidnapping case. *Davis v. State*, 365 Ark. 634, 232 S.W.3d 476 (2006).

In a kidnapping case, there was no error in the trial judge's failure to instruct the jury on false imprisonment because it was not considered a lesser-included offense to kidnapping. *Sweet v. State*, 2011 Ark. 20, 370 S.W.3d 510 (2011).

### **Restraint.**

In a case alleging rape, kidnapping, and third-degree domestic battery, a sufficiency of the evidence argument was not preserved for review because defendant argued on the first time on appeal that the amount of restraint or force used did not warrant a kidnapping conviction and a third-degree battery conviction in addition to the rape. This was not the same argument raised during a directed verdict motion. *Rounsaville v. State*, 372 Ark. 252, 273 S.W.3d 486 (2008).

Counsel was not ineffective for failing to move for a directed verdict on the issue of the amount of restraint used to commit a kidnapping, in violation of subdivision (a)(5) of this section, because the state presented substantial evidence that defendant used deception to restrain the victim; defendant told the victim he was a police officer and showed her a badge, which constituted deception. *Prater v. State*, 2012 Ark. 164, — S.W.3d — (2012).

### **Sentencing.**

Where appellant entered negotiated pleas of guilty to kidnapping under this section and additional charges, he was sentenced to 120 months' in prison with an additional 120-month suspended sentence; appellant was not entitled to post-conviction relief under Ark. R. Crim. P. 37.1, because he could not prove that counsel failed to advise him of a possible life sentence under § 5-4-401. On the record, counsel indicated that he had ad-



vised appellant that he could be subject to a life sentence if he violated the terms of the suspended sentence. *French v. State*, 2009 Ark. 443, — S.W.3d — (2009).

Defendant never argued to the trial court that the state’s evidence proved a Class B felony kidnapping pursuant to this section, but not Class Y. Accordingly, defendant failed to comply with the requirements of Ark. R. Crim. P. 33.1(a), (c), and the issue was not preserved for appellate review. *Sweet v. State*, 2011 Ark. 20, 370 S.W.3d 510 (2011).

In a case where probation was revoked, a 20-year sentence for Class B felony kidnapping was not improper since it was authorized under § 5-4-401(a)(3); the appellate court was unable to reduce a sentence within the range of punishment contemplated by the Arkansas Legislature. Moreover, since appellant failed to object to the sentence imposed, he was unable to argue on appeal that the trial court erred by failing to consider alternatives to the 20-year sentence. *Pfeifer v. State*, 2012 Ark. App. 556, — S.W.3d — (2012).

**Voluntary Release of Victim.**

Circuit did not err by refusing to lower the kidnapping charge from a Class Y to a Class B felony as defendant did not release his stepdaughter where the stepdaughter was left with a mask over her face, a gag in her mouth, her feet bound together, her hands bound behind her back, and was left in a house that was in a rural area with no one expected to be home for several hours; although the stepdaughter found a cellular phone and scissors defendant left for her, she was unable to physically release herself from her restraints. *Davis v. State*, 368 Ark. 401, 246 S.W.3d 862 (2007).

Trial court did not err in denying defendant’s motion for a directed verdict to reduce the kidnapping charge from a Class Y felony to a Class B felony under subdivisions (b)(1) and (2) of this section because defendant released the victim based on her resistance, and because he did not leave her in a safe place when he left her in the path of his vehicle. *Huff v. State*, 2012 Ark. 388, — S.W.3d — (2012).

**5-11-103. False imprisonment in the first degree.**

**CASE NOTES**

**Lesser Included Offenses.**

Second-degree false imprisonment is not a lesser included offense of kidnapping; thus, instruction on second-degree

or first-degree false imprisonment was not required in a kidnapping case. *Davis v. State*, 365 Ark. 634, 232 S.W.3d 476 (2006).

**5-11-104. False imprisonment in the second degree.**

**CASE NOTES**

**Lesser Included Offenses.**

Second-degree false imprisonment is not a lesser included offense of kidnapping; thus, instruction on second-degree

or first-degree false imprisonment was not required in a kidnapping case. *Davis v. State*, 365 Ark. 634, 232 S.W.3d 476 (2006).

**5-11-108. [Repealed.]**

**Publisher’s Notes.** This section, concerning trafficking of persons, was repealed by Acts 2013, Nos. 132 and 133,

§ 2. The section was derived from Acts 2005, No. 2267, § 1.

## CHAPTER 12

### ROBBERY

#### 5-12-101. Definition.

##### CASE NOTES

##### Physical Force.

Court rejected defendant's argument that the evidence was insufficient to support his conviction of felony robbery under § 5-12-102(a) because the state failed to prove that he used physical force to take the victim's purse where the state presented no evidence of a struggle or fight, of more force than necessary to pull the purse from the victim's arm, or of his touching any part of the victim's body.

#### 5-12-102. Robbery.

##### CASE NOTES

##### ANALYSIS

Accomplice.  
Elements.  
Evidence.  
Lesser Included Offenses.  
Ownership.  
Physical Force.  
Sentence.  
Sufficiency of Evidence.  
Threat of Force.

##### Accomplice.

Substantial evidence supported defendant's convictions for aggravated robbery, kidnapping, aggravated assault, theft of property, unlawful discharge of a firearm from a vehicle, and fleeing because while the state did not prove that defendant actually entered a bank, it did provide substantial evidence that he was the driver of the getaway car and thus was an accomplice of the two men who committed the aggravated robbery, kidnapping, and theft of property; while defendant did not personally shoot at an officer's vehicle, his conduct of driving the fleeing vehicle while another person in the car fired the shots sufficiently implicated him as an accomplice to unlawfully discharging a firearm from a vehicle. *Barber v. State*, 2010 Ark. App. 210, 374 S.W.3d 709 (2010).

Because the victim testified that defendant snatched her purse from her, causing pain and bruises to her hand and right arm, the jury could have inferred from this evidence that injury was done, that force was used in taking the purse, and that bodily impact occurred sufficient to meet the statutory requirement of physical force. *Banks v. State*, 2009 Ark. App. 633, — S.W.3d — (2009).

There was sufficient evidence tending to connect defendant to an aggravated robbery and thus to corroborate accomplice testimony because surveillance video established the commission of the crime and an officer testified that defendant matched the description of a robber in the video based on his height and that the officer confirmed the truth of identifying information from a non-accomplice. *Smith v. State*, 2012 Ark. App. 534, — S.W.3d — (2012).

##### Elements.

In defendant's attempted capital murder case, the state presented substantial evidence of defendant's intent to commit theft because there was the victim's testimony, in which she stated that defendant told her that he was going to rob her, there was the fact that two twenty-dollar bills and some quarters were missing from the store after the attack, and there was also defendant's own videotaped statement in which he admitted to taking money from the cash register. *Goodwin v. State*, 373 Ark. 53, 281 S.W.3d 258 (2008).

##### Evidence.

Trial court did not err by denying defendant's motion for a directed verdict on his capital murder conviction because the evidence was sufficient to support defen-



dant's conviction of the underlying felony, aggravated robbery, even after eliminating the testimony of one of defendant's accomplices. Evidence showed that: (1) defendant had the purpose of committing a theft with the use of physical force, as he and three other individuals went to a witness's house to acquire ammunition for their firearm; (2) the fourth individual testified that defendant and three men arrived at his trailer where defendant displayed a gun, and that he provided ammunition for the gun; (3) a second witness, one of the three men who accompanied defendant, testified that he heard two gunshots fired after the two other men left the victim's apartment after the struggle between defendant and the victim ensued; and (4) the chief medical examiner testified that the victim died from a gunshot wound. *Gardner v. State*, 362 Ark. 413, 208 S.W.3d 774 (2006).

There was sufficient evidence to support convictions for aggravated robbery and capital murder based on defendant's admission that she held the victim's hands down while he was beaten inside an apartment during an alleged robbery and the testimony of an accomplice waiting outside; the accomplice testimony was sufficiently corroborated. *Johnson v. State*, 366 Ark. 8, 233 S.W.3d 123 (2006), appeal dismissed, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 251 (2007).

There was sufficient evidence to support a conviction where evidence showed that two murders were committed during a robbery, defendant made inculpatory statements regarding the robbery, the victims had a large amount of cash, and defendant made calls to their phone on the day of the shooting. *Harris v. State*, 366 Ark. 190, 234 S.W.3d 273 (2006).

Evidence was sufficient to sustain defendant's convictions for aggravated robbery, residential burglary, and felony theft of property because an accomplice testified that he and defendant had a purpose of committing theft when they went to the victim's apartment, defendant used physical force upon the victim, defendant was armed with a deadly weapon, and a witness testified that she observed defendant carry out a television and load it into the car. *Navarro v. State*, 371 Ark. 179, 264 S.W.3d 530 (2007).

Substantial evidence indicated that defendant was armed with a deadly weapon

for the purpose of committing theft, and defendant was part of a plan to take the victim's money; there did not have to be an actual transfer of property to take place for the offense of aggravated robbery to be complete, and defendant and another clearly followed through with the plan, whether or not they verbally acknowledged their agreement at the time the plan was conceived. *Moore v. State*, 372 Ark. 579, 279 S.W.3d 69 (2008).

Denial of defendant's motion for directed verdict on capital murder and aggravated murder charges under this section and §§ 5-10-101 and 5-12-103 was proper as the evidence showed that defendant held a pistol, a deadly weapon, and that he committed theft while armed with the pistol; the evidence also showed that he caused the death of the victim in immediate flight from the aggravated robbery under circumstances manifesting extreme indifference to the value of human life. *Flowers v. State*, 373 Ark. 119, 282 S.W.3d 790 (2008).

Defendant's convictions for two counts of aggravated robbery were proper under subsection (a) of this section and § 5-12-103(a) because a neighbor verified that one of the intruders had a gun; the victim told officers that the intruders hid their guns in the closet, where two guns were found; and both intruders were charged in the same instrument, implicating accomplice liability. That provided substantial evidence to support the finding that the intruders at minimum represented by word or conduct that they were armed as a threat in order to commit the theft. *Hinton v. State*, 2010 Ark. App. 341, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 516 (June 2, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 399 (Aug. 6, 2010).

Evidence was sufficient to sustain defendant's convictions for capital murder and aggravated robbery because defendant drove his accomplice to the victim's house, defendant admitted to hitting the victim over the head, and the evidence illustrated he wanted to harm the victim because he did it again after he stated that the victim was not fazed. Additionally, the victim's wallet was taken from the house. *Laswell v. State*, 2012 Ark. 201, — S.W.3d — (2012).

**Lesser Included Offenses.**

Trial court did not err in failing to give a jury an instruction on simple robbery, which was a lesser-included offense of aggravated robbery, because defendant essentially argued that defendant did not commit any offense at all; hence, there was no rational basis for the giving of a lesser-included offense instruction. *Nickelson v. State*, 2012 Ark. App. 363, — S.W.3d — (2012).

Counsel complied with Ark. Sup. Ct. & Ct. App. R. 4-3(k), and appellant's appeal from his aggravated robbery conviction and sentence lacked merit because (1) the sufficiency of the evidence was not preserved for appellate review as counsel's motion for directed verdict failed to state with specificity the deficiency in the state's evidence, in contravention of Ark. R. Crim. P. 33.1; (2) there was no merit to appellant's chain-of-custody argument to the items found in his car pursuant to a search warrant as there was no evidence of tampering presented, and there was testimony that the items were logged into evidence and remained in the evidence room until the trial; (3) it was undisputed that an armed robbery took place under § 5-12-103(a)(1), so it was not an error to refuse to give an instruction on the lesser-included offense of robbery under subsection (a) of this section; and (4) appellant could not raise an ineffective assistance of counsel claim or challenge the qualifications of jurors for the first time on appeal. *Mace v. State*, 2012 Ark. App. 420, — S.W.3d — (2012).

Jury instruction on the lesser-included offense of attempted aggravated robbery was not warranted because there was no evidence of the offense of attempt under § 5-3-201(a)(2); when appellant stormed out of a retail store's stockroom brandishing a gun and pointing it employees, he actually completed the offense of aggravated robbery. *Thomas v. State*, 2012 Ark. App. 466, — S.W.3d — (2012).

**Ownership.**

Evidence was sufficient to support defendant's conviction of aggravated robbery under this section where defendant pointed a pistol at the victim and demanded that the victim repay a two dollar debt because the intent to collect a debt at gunpoint did not negate the necessary intent to steal under § 5-36-103(a)(1). Be-

cause defendant could not trace his ownership to the specific bills in the victim's possession, the victim, and not defendant, was the owner of the money in his possession, and it was theft to take it from him. *Heard v. State*, 2009 Ark. 546, 354 S.W.3d 49 (2009).

**Physical Force.**

Evidence was sufficient to prove the theft element of aggravated robbery; evidence showed that defendant used physical force to at least temporarily deprive victim of her car, which was sufficient proof. *Winston v. State*, 368 Ark. 105, 243 S.W.3d 304 (2006).

Directed verdict was properly denied in a case involving robbery and capital murder because defendant shot the victim while he slept with the intent of taking some of his belongings. Therefore, evidence presented to the jury showed that defendant employed or threatened to immediately employ physical force upon the victim with the purpose of committing a felony or misdemeanor theft. *Terry v. State*, 371 Ark. 50, 263 S.W.3d 528 (2007).

**Sentence.**

Robbery in Arkansas qualifies as a crime of violence under U.S. Sentencing Guidelines Manual § 4B1.2(a)(1), and attempted robbery qualifies under application note 1 to § 4B1.2. *United States v. Sawyer*, 588 F.3d 548 (8th Cir. 2009).

Where defendant pled guilty to armed bank robbery and had a prior state conviction for attempted robbery, the career offender provision of U.S. Sentencing Guidelines Manual § 4B1.1 was properly applied in calculating defendant's advisory Guidelines sentencing range because robbery in Arkansas qualified as a crime of violence under U.S. Sentencing Guidelines Manual § 4B1.2(a)(1), and attempted robbery qualified under § 4B1.2, application n. 1. *United States v. Sawyer*, 588 F.3d 548 (8th Cir. 2009).

**Sufficiency of Evidence.**

Court rejected defendant's argument that the evidence was insufficient to support his conviction of felony robbery under subsection (a) of this section because the state failed to prove that he used physical force to take the victim's purse where the state presented no evidence of a struggle or fight, of more force than necessary to pull the purse from the victim's arm, or of



his touching any part of the victim's body. Because the victim testified that defendant snatched her purse from her, causing pain and bruises to her hand and right arm, the jury could have inferred from this evidence that injury was done, that force was used in taking the purse, and that bodily impact occurred sufficient to meet the statutory requirement of physical force. *Banks v. State*, 2009 Ark. App. 633, — S.W.3d — (2009).

As the victim exited her truck, a man grabbed her by her neck, put a gun to her head, and asked for her keys; she was forced into her residence and heard a shotgun fire as the man drove away. The police spotted the truck traveling at a high rate of speed apparently in flight from the scene of the crime and defendant's fingerprint was recovered from the doors; the evidence was not sufficient to sustain defendant's conviction for aggravated robbery, theft of property, and criminal mischief because there was no way to determine when defendant touched the truck. *Turner v. State*, 103 Ark. App. 248, 288 S.W.3d 669 (2008), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 514 (Jan. 22, 2009).

Evidence was sufficient to support defendant's conviction for robbery in violation of this section because he beat and kicked the victim, took his cell phone and wallet, asked for additional money, threatened to shoot him, and ran away; the probable consequence of those actions was that the victim would be deprived of his property, and even though defendant asserted that his motive was only "belittlement" and physical injury, the jury could have inferred from the events in the case

that the statutory intent to commit a theft was satisfied. *Sims v. State*, 2010 Ark. App. 133, — S.W.3d — (2010).

Appellant's convictions for aggravated robbery, aggravated residential burglary, and misdemeanor fleeing were affirmed where a witness testified that appellant pointed a sawed-off shotgun at his head, which would necessarily constitute proof that appellant was "armed with a deadly weapon"; the testimony of one eyewitness was sufficient to sustain a conviction. *Riley v. State*, 2011 Ark. App. 511, 385 S.W.3d 355 (2011).

There was sufficient evidence to sustain an aggravated robbery conviction under this section because there was a verbal representation in a note; there was no requirement that the threat of physical harm be made directly or indirectly, only that physical force be immediately threatened, however the threat was communicated. *Walden v. State*, 2012 Ark. App. 307, — S.W.3d — (2012).

### **Threat of Force.**

Although defendant shot the victim three times as the result of an inadvertent collision with the victim as the victim attempted to run, actual physical force was not required to convict defendant of aggravated robbery. His possession of a gun and his threat to employ the gun were sufficient to support his conviction under this section and § 5-12-103. *Ali v. State*, 2011 Ark. App. 758, — S.W.3d — (2011).

**Cited:** *Whitt v. State*, 365 Ark. 580, 232 S.W.3d 459 (2006); *Boldin v. State*, 373 Ark. 295, 283 S.W.3d 565 (2008); *Lacy v. State*, 2010 Ark. 388, — S.W.3d — (2010); *Ramsey v. State*, 2010 Ark. App. 836, 378 S.W.3d 797 (2010).

## **5-12-103. Aggravated robbery.**

### **RESEARCH REFERENCES**

**ALR.** Parts of Human Body, other than Feet, as Deadly or Dangerous Weapons or Instrumentalities for Purposes of Statutes

Aggravating Offenses such as Assault and Robbery. 67 A.L.R.6th 103.

## CASE NOTES

## ANALYSIS

Accomplice.  
Conspiracy.  
Double Jeopardy.  
Elements.  
Evidence.  
Lesser Included Offense.  
Ownership.  
Representation of Deadly Weapon.  
Sentence.

**Accomplice.**

Trial court did not err in denying defendant's motion for directed verdict as there was sufficient evidence to support defendant's conviction of the underlying felony, aggravated robbery, and capital-murder, after eliminating the accomplice testimony; other corroborating evidence demonstrated that defendant had the purpose of committing theft with the use of physical force, was armed with a deadly weapon, and caused the death of the victim and, further, a doctor testified that the victim died from a gunshot wound. *Gardner v. State*, 364 Ark. 506, 221 S.W.3d 339 (2006).

Sufficient evidence supported defendant's convictions as an accomplice to theft of property and aggravated robbery, pursuant to this section, because defendant was present during the crime, the state established a substantial association between defendant and codefendant, and, based on those linking facts, it was reasonable for the jury to conclude that defendant assisted her codefendant by finding the victim, setting up a meeting, leading the victim to a remote location, assuring the victim would have a substantial amount of cash, moving to the backseat of the car during the robbery, and by encouraging the victim to give codefendant the cash. *Ramsey v. State*, 2010 Ark. App. 836, 378 S.W.3d 797 (2010).

There was sufficient evidence tending to connect defendant to an aggravated robbery and thus to corroborate accomplice testimony because surveillance video established the commission of the crime and an officer testified that defendant matched the description of a robber in the video based on his height and that the officer confirmed the truth of identifying information from a non-accomplice. *Smith*

*v. State*, 2012 Ark. App. 534, — S.W.3d — (2012).

**Conspiracy.**

Defendant committed an overt act in furtherance of a conspiracy to commit kidnapping, aggravated robbery, theft of property, and aggravated residential burglary because he took another person to his residence and showed the person the inside of the premises, discussed how to break in the residence and how to subdue his wife, and identified the property to be taken from the residence. *Winkler v. State*, 2012 Ark. App. 704, — S.W.3d —, 2012 Ark. App. LEXIS 825 (Dec. 12, 2012).

**Double Jeopardy.**

Trial court did not err in determining that consecutive sentencing for aggravated robbery, under subdivision (a)(1) of this section, first-degree terroristic threatening, § 5-13-301(a)(1)(A), and second-degree battery, § 5-13-202(a)(2), did not violate the prohibition against double jeopardy in Ark. Const. Art. 2, § 8 and the Fifth Amendment because neither first-degree terroristic threatening nor second-degree battery was a lesser-included offense of aggravated robbery since both crimes required proof of additional facts not required by aggravated robbery; the offense of first-degree terroristic threatening requires the elements of threatening to cause the death of the victim and the purpose of terrorizing the victim, and a conviction for second-degree battery requires proof of purposely causing physical injury to the victim. *Walker v. State*, 2012 Ark. App. 61, 389 S.W.3d 10 (2012), review denied, — S.W.3d —, 2012 Ark. LEXIS 95 (Ark. Feb. 23, 2012).

**Elements.**

Evidence was sufficient to prove the theft element of aggravated robbery; evidence showed that defendant used physical force to at least temporarily deprive victim of her car, which was sufficient proof. *Winston v. State*, 368 Ark. 105, 243 S.W.3d 304 (2006).

In defendant's attempted capital murder case, the state presented substantial evidence of defendant's intent to commit theft because there was the victim's testimony, in which she stated that defendant told her that he was going to rob her, there



was the fact that two twenty-dollar bills and some quarters were missing from the store after the attack, and there was also defendant's own videotaped statement in which he admitted to taking money from the cash register. *Goodwin v. State*, 373 Ark. 53, 281 S.W.3d 258 (2008).

Defendant was not required to point a gun at each of the several victims to a home invasion robbery in order to have committed aggravated robbery against each of them in violation of subdivisions (a)(1)-(3) of this section. His holding a gun to the heads of two of the victims was sufficient to instill fear in the remaining victims. *Morris v. State*, 2011 Ark. App. 12, — S.W.3d — (2011).

Although defendant shot the victim three times as the result of an inadvertent collision with the victim as the victim attempted to run, actual physical force was not required to convict defendant of aggravated robbery. His possession of a gun and his threat to employ the gun were sufficient to support his conviction under § 5-12-102 and this section. *Ali v. State*, 2011 Ark. App. 758, — S.W.3d — (2011).

### **Evidence.**

On appeal from convictions for two counts of aggravated robbery, pursuant to subdivision (a)(1) of this section, one count of battery, and a firearm enhancement, defendant's challenge to the sufficiency of the evidence was unsuccessful because the state presented sufficient proof of defendant's identity as one of two armed men who stole cough medicine from a pharmacy, and the state also presented sufficient evidence to establish his liability as an accomplice for all criminal acts in furtherance of that goal. *Brown v. State*, 2009 Ark. App. 826, — S.W.3d — (2009).

Trial court did not err by denying defendant's motion for a directed verdict on his capital murder conviction because the evidence was sufficient to support defendant's conviction of the underlying felony, aggravated robbery, even after eliminating the testimony of one of defendant's accomplices. Evidence showed that: (1) defendant had the purpose of committing a theft with the use of physical force, as he and three other individuals went to a witness's house to acquire ammunition for their firearm; (2) the fourth individual testified that defendant and three men arrived at his trailer where defendant

displayed a gun, and that he provided ammunition for the gun; (3) a second witness, one of the three men who accompanied defendant, testified that he heard two gunshots fired after the two other men left the victim's apartment after the struggle between defendant and the victim ensued; and (4) the chief medical examiner testified that the victim died from a gunshot wound. *Gardner v. State*, 362 Ark. 413, 208 S.W.3d 774 (2006).

Where defendant was convicted of aggravated robbery and capital murder for killing a grocery store owner, the trial court did not err in denying defendant's motion for a directed verdict because the jury did not have to resort to speculation and conjecture as it apparently believed testimony from defendant's four friends concerning his actions and admissions on the night the crimes were committed and the next day when he fled. *Whitt v. State*, 365 Ark. 580, 232 S.W.3d 459 (2006).

There was sufficient evidence to support a conviction where evidence showed that two murders were committed during a robbery, defendant made inculpatory statements regarding the robbery, the victims had a large amount of cash, and defendant made calls to their phone on the day of the shooting. *Harris v. State*, 366 Ark. 190, 234 S.W.3d 273 (2006).

Evidence was sufficient to sustain defendant's convictions for aggravated robbery, residential burglary, and felony theft of property because an accomplice testified that he and defendant had a purpose of committing theft when they went to the victim's apartment, defendant used physical force upon the victim, defendant was armed with a deadly weapon, and a witness testified that she observed defendant carry out a television and load it into the car. *Navarro v. State*, 371 Ark. 179, 264 S.W.3d 530 (2007).

Defendant's convictions for aggravated robbery and theft were proper because defendant employed physical force upon the victim, admitted to stabbing the victim, and was armed with a deadly weapon. Further, the fact that defendant pawned the victim's tools and tried to sell other stolen items established a purpose to commit theft. *Young v. State*, 371 Ark. 393, 266 S.W.3d 744 (2007).

Substantial evidence indicated that defendant was armed with a deadly weapon for the purpose of committing theft, and

defendant was part of a plan to take the victim's money; there did not have to be an actual transfer of property to take place for the offense of aggravated robbery to be complete, and defendant and another clearly followed through with the plan, whether or not they verbally acknowledged their agreement at the time the plan was conceived. *Moore v. State*, 372 Ark. 579, 279 S.W.3d 69 (2008).

Denial of defendant's motion for directed verdict on capital murder and aggravated murder charges under this section and §§ 5-10-101 and 5-12-102, was proper as the evidence showed that defendant held a pistol, a deadly weapon, and that he committed theft while armed with the pistol; the evidence also showed that he caused the death of the victim in immediate flight from the aggravated robbery under circumstances manifesting extreme indifference to the value of human life. *Flowers v. State*, 373 Ark. 119, 282 S.W.3d 790 (2008).

Sufficient evidence supported defendant's convictions for first-degree murder under § 5-10-102(a), and aggravated robbery under subsection (a) of this section, including the testimony of several witnesses who saw defendant with the victim's car, as well as the testimony of two witnesses who saw defendant drive the car under the bridge where the victim's body was found and return without the victim in the car. Defendant told one witness that he intended to kill the victim and steal his car, and after the murder he boasted about shooting the victim and showed two witnesses the bullet he found in the victim's car; the bullet he was carrying was consistent with the suspected murder weapon, and the victim's blood was found on his clothing. *Boldin v. State*, 373 Ark. 295, 283 S.W.3d 565 (2008).

Substantial evidence supported the jury's verdict that defendant committed aggravated robbery in that he robbed the victim of the contents of the cigar box and inflicted serious injury; the cigar box was nearly empty when found and the slip of paper the victim kept in the box was found in defendant's property taken when he was booked. *Sales v. State*, 374 Ark. 222, 289 S.W.3d 423 (2008), cert. denied, *Sales v. Arkansas*, — U.S. —, 129 S. Ct. 2000, 173 L. Ed. 2d 1098 (2009).

Defendant's convictions for two counts of aggravated robbery were proper under § 5-12-102(a) and subsection (a) of this section because a neighbor verified that one of the intruders had a gun; the victim told officers that the intruders hid their guns in the closet, where two guns were found; and both intruders were charged in the same instrument, implicating accomplice liability. That provided substantial evidence to support the finding that the intruders at minimum represented by word or conduct that they were armed as a threat in order to commit the theft. *Hinton v. State*, 2010 Ark. App. 341, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 516 (June 2, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 399 (Aug. 6, 2010).

While there was no testimony that anyone saw defendant at the scene or with a gun, evidence was sufficient to convict defendant of aggravated robbery, under this section, and first-degree murder, under § 5-10-102(a)(1), as it showed defendant had access to a gun, the car defendant was driving that night was at the scene, and the victim's condition suggested a robbery. *Bates v. State*, 2010 Ark. App. 417, — S.W.3d — (2010).

Defendant's aggravated robbery conviction pursuant to this section was proper because a car theft victim's testimony that the victim got out of the victim's car when defendant indicated that defendant had a gun was sufficient to substantiate the conviction. *Sartin v. State*, 2010 Ark. App. 494, — S.W.3d — (2010).

Evidence was sufficient to support the jury's finding that defendant committed aggravated robbery where defendant was armed with a knife, used it to threaten to kill the victim, and then stole money from her and a medical clinic. *Sweet v. State*, 2011 Ark. 20, 370 S.W.3d 510 (2011).

Defendant's convictions for aggravated residential burglary in violation of § 5-39-204(a) and aggravated robbery in violation of subsection (a) of this section were appropriate because the state provided sufficient evidence to corroborate his accomplices' testimony; even eliminating the accomplice testimony, the remaining evidence presented independently established the crimes and tended to connect defendant with their commission. In part, witnesses testified about defendant being



with the accomplices on the day of the crimes and the state also presented a witness's testimony that defendant had sold him the three shotguns that were identified as being the ones stolen from the victim. *Tucker v. State*, 2011 Ark. 144, 381 S.W.3d 1 (2011), dismissed, *Tucker v. Hobbs*, — F. Supp. 2d —, 2012 U.S. Dist. LEXIS 129748 (E.D. Ark. Sept. 12, 2012).

Evidence that defendant demanded money from a store employee while brandishing a firearm supported his conviction for aggravated robbery. *Lambert v. State*, 2011 Ark. App. 258, — S.W.3d — (2011).

Defendant's conviction for capital-felony murder under § 5-10-101(a)(1) and subdivision (a)(3) of this section was appropriate because the evidence was sufficient. The last number dialed on the victim's cellular phone was to a phone registered to defendant and a fellow prisoner testified that defendant confessed to selling drugs to the victim, robbing and shooting him, and then leaving him on the road. *Dixon v. State*, 2011 Ark. 450, 385 S.W.3d 164 (2011).

Defendant's convictions for first-degree murder and aggravated robbery, in violation of §§ 5-10-102(a) and 5-3-201 and subsection (a) of this section, were supported by sufficient evidence, as the evidence showed that defendant was armed with a deadly weapon for the purpose of committing the theft of a cab driver, that defendant threatened the driver, and that the driver was shot in the struggle over the gun. *Garr v. State*, 2011 Ark. App. 509, — S.W.3d — (2011).

Appellant's convictions for aggravated robbery, aggravated residential burglary, and misdemeanor fleeing were affirmed where a witness testified that appellant pointed a sawed-off shotgun at his head, which would necessarily constitute proof that appellant was "armed with a deadly weapon"; the testimony of one eyewitness was sufficient to sustain a conviction. *Riley v. State*, 2011 Ark. App. 511, 385 S.W.3d 355 (2011).

Evidence was sufficient to sustain defendant's aggravated robbery conviction because he brandished a weapon, which was a communicated threat, and it was done while defendant was essentially asking if the victim had anything of value. The fact that defendant did not actually take anything else from the victim while in possession of the firearm was not fatal

to his conviction. *Butler v. State*, 2011 Ark. App. 708, — S.W.3d — (2011).

Evidence was sufficient to sustain defendant's convictions for capital murder and aggravated robbery because defendant drove his accomplice to the victim's house, defendant admitted to hitting the victim over the head, and the evidence illustrated he wanted to harm the victim because he did it again after he stated that the victim was not fazed. Additionally, the victim's wallet was taken from the house. *Laswell v. State*, 2012 Ark. 201, — S.W.3d — (2012).

There was sufficient evidence to sustain an aggravated robbery conviction under this section because there was a verbal representation in a note; there was no requirement that the threat of physical harm be made directly or indirectly, only that physical force be immediately threatened, however the threat was communicated. *Walden v. State*, 2012 Ark. App. 307, — S.W.3d — (2012).

Trial court did not err in denying defendant's motion for a directed verdict on an aggravated robbery charge, in violation of subdivisions (a)(1) and (2) of this section, because substantial evidence supported the conviction; according to defendant's own statement to the police, defendant participated in the planning of the robbery by driving accomplices around town in order to case possible bank targets. *Nickelson v. State*, 2012 Ark. App. 363, — S.W.3d — (2012).

Evidence was sufficient to sustain convictions for capital murder and aggravated robbery because a witness's testimony corroborated that defendant was an accomplice to the aggravated robbery, defendant knew there was a large amount of marijuana at the home, a gun was used during the robbery, and the victim's death occurred during the robbery under circumstances manifesting extreme indifference to the value of human life. *Bradley v. State*, 2013 Ark. 58, — S.W.3d — (2013).

Evidence was sufficient to sustain convictions for aggravated robbery and aggravated residential burglary because the victim testified that when defendant came into her house, he told her to give him her money and that he was going to kill her. Defendant had a paper bag over his right hand and his right hand was pointing directly at her stomach; she believed that there was a gun in the paper bag. *Dobbins*

v. State, 2013 Ark. App. 269, — S.W.3d — (2013).

### **Lesser Included Offense.**

Prohibition against double jeopardy was not violated when defendant was convicted of first-degree battery and aggravated robbery because the elements of the offenses were not the same, and aggravated battery was not a lesser included offense of aggravated robbery. Clark v. State, 373 Ark. 161, 282 S.W.3d 801 (2008).

First-degree battery is not a lesser included offense of aggravated robbery as it is not established by proof of the same or less than all of the elements required to prove aggravated robbery. First-degree battery requires proof of the use of a firearm, whereas aggravated robbery does not; aggravated robbery requires proof of a robbery, whereas first-degree battery does not. Clark v. State, 373 Ark. 161, 282 S.W.3d 801 (2008).

Trial court did not err in refusing to instruct the jury on aggravated assault during defendant's trial for aggravated robbery because aggravated assault, in violation of § 5-13-204(a)(1) and (2), was not a lesser-included offense of aggravated robbery pursuant to § 5-1-110(b)(1) as the two offenses required different elements of proof; aggravated assault required proof of circumstances manifesting extreme indifference to the value of human life, whereas aggravated robbery did not require such proof. Matthews v. State, 2009 Ark. 321, 319 S.W.3d 266 (2009).

In an aggravated robbery case, where there was no rational basis for a trial judge to instruct the jury on ordinary robbery, there was no error in the trial judge's failure to do so. Sweet v. State, 2011 Ark. 20, 370 S.W.3d 510 (2011).

Trial court did not err in failing to give a jury an instruction on simple robbery, which was a lesser-included offense of aggravated robbery, in violation of subdivisions (a)(1) and (2) of this section, because defendant essentially argued that defendant did not commit any offense at all; hence, there was no rational basis for the giving of a lesser-included offense instruction. Nickelson v. State, 2012 Ark. App. 363, — S.W.3d — (2012).

Counsel complied with Ark. Sup. Ct. & Ct. App. R. 4-3(k), and appellant's appeal from his aggravated robbery conviction

and sentence lacked merit because (1) the sufficiency of the evidence was not preserved for appellate review as counsel's motion for directed verdict failed to state with specificity the deficiency in the state's evidence, in contravention of Ark. R. Crim. P. 33.1; (2) there was no merit to appellant's chain-of-custody argument to the items found in his car pursuant to a search warrant as there was no evidence of tampering presented, and there was testimony that the items were logged into evidence and remained in the evidence room until the trial; (3) it was undisputed that an armed robbery took place under subdivision (a)(1) of this section, so it was not an error to refuse to give an instruction on the lesser-included offense of robbery under § 5-12-102(a); and (4) appellant could not raise an ineffective assistance of counsel claim or challenge the qualifications of jurors for the first time on appeal. Mace v. State, 2012 Ark. App. 420, — S.W.3d — (2012).

Jury instruction on the lesser-included offense of attempted aggravated robbery was not warranted because there was no evidence of the offense of attempt under § 5-3-201(a)(2); when appellant stormed out of a retail store's stockroom brandishing a gun and pointing it employees, he actually completed the offense of aggravated robbery. Thomas v. State, 2012 Ark. App. 466, — S.W.3d — (2012).

### **Ownership.**

Evidence was sufficient to support defendant's conviction of aggravated robbery under § 5-36-102 where defendant pointed a pistol at the victim and demanded that the victim repay a two dollar debt because the intent to collect a debt at gunpoint did not negate the necessary intent to steal under subdivision (a)(1) of this section. Because defendant could not trace his ownership to the specific bills in the victim's possession, the victim, and not defendant, was the owner of the money in his possession, and it was theft to take it from him. Heard v. State, 2009 Ark. 546, 354 S.W.3d 49 (2009).

### **Representation of Deadly Weapon.**

Testimony from a victim and a witness in a mall parking lot purse snatching that defendant verbally represented that he had a gun and would shoot was sufficient to convict defendant for aggravated rob-



bery under subsection (a) of this section regardless of whether he did in fact have a weapon. *Nelson v. State*, 2010 Ark. App. 69, — S.W.3d — (2010).

Defendant’s conviction for aggravated robbery, in violation of subdivision (a)(2) of this section, was supported by the evidence because, based on the victim’s testimony, the jury could have inferred that the victim believed defendant was showing a second victim some sort of weapon during the bank robbery. *Feuget v. State*, 2012 Ark. App. 182, 394 S.W.3d 310 (2012).

**Sentence.**

Denial of writ of habeas corpus was proper, because life imprisonment for aggravated robbery was within the statutory range, irrespective of any enhancement as

a habitual offender, and a sentence that was within the prescribed range was not illegal. *Goins v. Norris*, 2012 Ark. 192, — S.W.3d — (2012).

In an aggravated robbery case, a trial court did not abuse its discretion by admitting evidence at sentencing of appellant’s participation in a prior robbery; it was of no consequence that appellant had not yet been convicted in the robbery at issue. As to relevance, the fact that appellant was an active participant in two robberies, just days apart and committed in nearly the same fashion, was relevant character evidence and was evidence of aggravated circumstances showing his propensity to engage in similar criminal conduct. *Thomas v. State*, 2012 Ark. App. 466, — S.W.3d — (2012).

**CHAPTER 13**  
**ASSAULT AND BATTERY**

SUBCHAPTER.

- 2. OFFENSES GENERALLY.
- 3. TERRORISM.

**SUBCHAPTER 2 — OFFENSES GENERALLY**

SECTION.

- 5-13-201. Battery in the first degree.
- 5-13-202. Battery in the second degree.
- 5-13-204. Aggravated assault.
- 5-13-205. Assault in the first degree.
- 5-13-209. Abuse of athletic contest officials.

SECTION.

- 5-13-211. Aggravated assault upon a certified law enforcement officer or an employee of a correctional facility.

**5-13-201. Battery in the first degree.**

- (a) A person commits battery in the first degree if:
  - (1) With the purpose of causing serious physical injury to another person, the person causes serious physical injury to any person by means of a deadly weapon;
  - (2) With the purpose of seriously and permanently disfiguring another person or of destroying, amputating, or permanently disabling a member or organ of that other person’s body, the person causes such an injury to any person;
  - (3) The person causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life;
  - (4) Acting alone or with one (1) or more other persons:
    - (A) The person commits or attempts to commit a felony; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony:

(i) The person or an accomplice causes serious physical injury to any person under circumstances manifesting extreme indifference to the value of human life; or

(ii) Another person who is resisting the felony or flight causes serious physical injury to any person;

(5) With the purpose of causing serious physical injury to an unborn child or to a woman who is pregnant with an unborn child, the person causes serious physical injury to the unborn child;

(6) The person knowingly causes physical injury to a pregnant woman in the commission of a felony or a Class A misdemeanor, and in so doing, causes serious physical injury to the pregnant woman's unborn child, and the unborn child is subsequently born alive;

(7) The person knowingly, without legal justification, causes serious physical injury to a person he or she knows to be twelve (12) years of age or younger;

(8) With the purpose of causing physical injury to another person, the person causes physical injury to any person by means of a firearm; or

(9) The person knowingly causes serious physical injury to any person four (4) years of age or younger under circumstances manifesting extreme indifference to the value of human life.

(b) It is an affirmative defense in any prosecution under subdivision (a)(4) of this section in which the defendant was not the only participant that the defendant:

(1) Did not commit the battery or in any way solicit, command, induce, procure, counsel, or aid the battery's commission;

(2) Was not armed with a deadly weapon;

(3) Reasonably believed that no other participant was armed with a deadly weapon; and

(4) Reasonably believed that no other participant intended to engage in conduct that could result in serious physical injury.

(c)(1) Except as provided in subdivisions (c)(2) and (3) of this section, battery in the first degree is a Class B felony.

(2) Battery in the first degree is a Class Y felony under the circumstances described in subdivision (a)(9) of this section.

(3) Battery in the first degree is a Class Y felony if the injured person is a law enforcement officer acting in the line of duty.

**History.** Acts 1975, No. 280, § 1601; A.S.A. 1947, § 41-1601; Acts 1987, No. 482, § 1; 1995, No. 360, § 1; 1995, No. 1305, § 1; 2005, No. 1994, § 474; 2007, No. 622, § 1; 2007, No. 709, § 2; 2007, No. 827, § 26.

**A.C.R.C. Notes.** Acts 2007, No. 709, § 1, provided:

"This act shall be known and may be cited as 'Corporal Scott Baxter's Law'."



## RESEARCH REFERENCES

**ALR.** Parts of Human Body, other than Feet, as Deadly or Dangerous Weapons or Instrumentalities for Purposes of Statutes

Aggravating Offenses such as Assault and Robbery. 67 A.L.R.6th 103.

## CASE NOTES

## ANALYSIS

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**Defense or Justification.**

Substantial evidence negated defendant's claim of self-defense under § 5-2-607(a)(2) in his trial for first degree battery under this section because there was no evidence that the victim was armed when defendant shot him and, although defendant testified that the victim attacked him earlier in the day, there was no evidence of an injury to defendant and defendant testified that he was not afraid of the victim; although defendant testified at trial that he was afraid that the victim was going to attack him at the time that he shot him, defendant never made a similar claim in his statement to the police after the incident. *Metcalf v. State*, 2011 Ark. App. 55, — S.W.3d — (2011), rehearing denied, — Ark. App. —, — S.W.3d —, 2011 Ark. App. LEXIS 147 (Feb. 23, 2011).

**Elements.**

There was no violation of defendant's rights under § 5-1-110(a)(4) because when comparing the elements of the two offenses it was evident that the conduct of committing a terroristic act under § 5-13-310 was not a specific instance of conduct constituting first-degree battery under this section. *Warren v. State*, 103 Ark. App. 124, 286 S.W.3d 768 (2008).

**Evidence.**

Defendant's convictions were supported by substantial evidence where it was shown that (1) shortly after the incident, defendant had a blood-alcohol level of .23 percent, (2) defendant was driving the car

that hit two women and narrowly missed a third, (3) just before the impact, defendant was witnessed to speed up and actually swerve the vehicle toward the women's path, and (4) defendant drove away after the impact. *Estacuy v. State*, 94 Ark. App. 183, 228 S.W.3d 567 (2006).

Evidence was sufficient to sustain a conviction for first degree battery because defendant drove a fully loaded commercial vehicle weighing over 82,000 pounds while under the influence of methamphetamine, and the entire vehicle, with the exception of the right rear axle, crossed into the oncoming-traffic lane, striking a motor home, and ultimately driving through it. Defendant never attempted to brake prior to the accident or to return to the proper lane of traffic. *Hoyle v. State*, 371 Ark. 495, 268 S.W.3d 313 (2007), rehearing denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 12 (Jan. 10, 2008).

Evidence was sufficient to support a conviction for first-degree battery under subdivision (a)(8) of this section where defendant purposely fired three times at an occupied truck on a highway; a passenger was struck and seriously injured. There was a presumption that defendant intended the natural and probable consequences of his actions. *Spight v. State*, 101 Ark. App. 400, 278 S.W.3d 599 (2008).

Evidence that included defendant's firing a shot in the direction of a victim's truck, testimony of two individuals that on separate occasions defendant told them he had shot a man, and defendant's evading the responding police was sufficient to convict defendant of first-degree battery in violation of subdivision (a)(3) of this section. *Warren v. State*, 103 Ark. App. 124, 286 S.W.3d 768 (2008).

When defendant's infant son was taken to the emergency room, the treating physician found that his broken femur was indicative of child abuse; the infant had fourteen broken rib bones in various stages of healing, and defendant admitted that he would squeeze his son when he got

mad. Defendant was convicted of three counts of battery in the second degree in violation of § 5-26-304 and one count of battery in the first degree under subdivision (a)(7) of this section; whether defendant committed serious physical injury under circumstances manifesting extreme indifference to the value of human life was not an issue in the case, because he was not charged under subdivision (a)(3) of this section. *Davis v. State*, 2009 Ark. App. 573, — S.W.3d — (2009).

Sufficient evidence supported the conclusion that a defendant intended to cause serious physical harm to a victim: a witness testified that the witness gave defendant a gun, other witnesses testified that defendant shot the victim with that gun, the victim was shot in the arm and hip, which required surgery, and the victim continued to suffer with pain and impairment as a result of the injuries. *Hawkins v. State*, 2009 Ark. App. 675, — S.W.3d — (2009).

Where the state's three witnesses testified that defendant threatened to kill the victim during an argument over money, the state proved by a preponderance of the evidence that defendant committed second-degree terroristic threatening under this section. The trial court was free to reject defendant's testimony that he never threatened the victim and was not a violent person; the trial court did not err by revoking his suspended sentence. *Whitney v. State*, 2009 Ark. App. 726, — S.W.3d — (2009).

Defendant's conviction of first-degree battery based upon defendant's participation as an accomplice was proper because there was sufficient evidence, including certain statements made by defendant, in addition to accomplice testimony, to support the conviction; defendant's own statement showed that when defendant left a store where a codefendant bought camouflage ski masks defendant knew, at a minimum, that the codefendant was carrying a gun and planning to harm an individual. *Porter v. State*, 2010 Ark. App. 657, 379 S.W.3d 528 (2010).

Substantial evidence supported defendant's conviction for first-degree battery pursuant to subdivision (a)(3) of this section because the evidence supported the jury's finding that defendant caused serious physical injury to the victim, who was the boyfriend of defendant's daughter, un-

der circumstances manifesting extreme indifference to the value of human life; defendant shot a gun through a door when he knew the victim was directly on the other side of it, and both the victim and the daughter told an investigator that they thought defendant intended to kill the victim and would have done so if the daughter had not called 911. *Reed v. State*, 2011 Ark. App. 352, 383 S.W.3d 881 (2011).

Defendant, while in a drunken rage, intentionally shot an unarmed person who was 15 feet away and trying to help calm him; the evidence was sufficient for the jury to conclude that defendant intended to shoot the victim and cause her harm, rather than to defend himself. *Stocker v. State*, 2012 Ark. App. 624, — S.W.3d —, 2012 Ark. App. LEXIS 753 (Nov. 7, 2012).

### Information.

State's amendment of an information did not violate § 16-85-407 because the amendment did not constitute a severance of offenses under Ark. R. Crim. P. 22.1(c), and the evidence would have been introduced in any case as part of the events leading up to the shooting whether it was included in the charging instrument or not; the only offense charged in the case was first-degree battery under subdivision (a)(3) of this rule, and the amendment did not change the nature or degree of the crime but merely clarified the manner in which the offense was committed. *Reed v. State*, 2011 Ark. App. 352, 383 S.W.3d 881 (2011).

### Instructions.

Circuit court did not abuse its discretion in denying defendant's second-degree battery instruction because the offense charged was first-degree battery pursuant to subdivision (a)(3) of this section, and the jury was not required to find that defendant employed a firearm in order to convict him of that offense, nor was the jury required to apply the firearm enhancement if it convicted defendant of first-degree battery; the firearm enhancement was not an element of the first-degree-battery offense but was an additional sentence authorized by statute if defendant was convicted of first-degree battery, and the jury determined that defendant employed a firearm during com-



mission of that offense. *Reed v. State*, 2011 Ark. App. 352, 383 S.W.3d 881 (2011).

#### **Lesser Included Offenses.**

In a first-degree battery case, a trial court did not err by refusing to give an instruction on second-degree battery because it was not a lesser included offense; both alternatives given in the proffered instruction required an additional element, serious physical injury, that was not required in the first-degree battery instruction that was given, which only required physical injury when the injury was caused by a firearm. Further, the proffered instruction was not a lesser included offense because the offense was not an attempt offense, and the proffered instruction did not differ from the offense charged only in the respect that a less serious injury to the same person sufficed to establish the offense's commission. *Spight v. State*, 101 Ark. App. 400, 278 S.W.3d 599 (2008).

During parents' trial for first-degree battery against their infant, in violation of subdivision (a)(9) of this section, the court did not err in refusing to instruct the jury on the lesser-included offense of third-degree battery because the physical injury

the infant sustained could only be described as serious; the infant was severely malnourished to the point of starvation and death would have occurred within days without medical attention. *Bruner v. State*, 2013 Ark. 68, — S.W.3d — (2013).

#### **Multiple Convictions.**

There was no violation of defendant's rights under § 5-1-110(a)(4) because when comparing the elements of the two offenses it was evident that the conduct of committing a terroristic act under § 5-13-310 was not a specific instance of conduct constituting first-degree battery under this section. *Warren v. State*, 103 Ark. App. 124, 286 S.W.3d 768 (2008).

#### **Physical Injury.**

Evidence that defendant participated in kicking a 14-year-old victim while he was lying on the ground after having his two front teeth knocked out by one of defendant's fellow assailants, was sufficient to support defendant's conviction for first-degree battery in violation of subdivision (a)(3) of this section. *Williamson v. State*, 2011 Ark. App. 73, 381 S.W.3d 134 (2011).

**Cited:** *Misenheimer v. State*, 100 Ark. App. 189, 265 S.W.3d 764 (2007).

### **5-13-202. Battery in the second degree.**

(a) A person commits battery in the second degree if:

(1) With the purpose of causing physical injury to another person, the person causes serious physical injury to another person;

(2) With the purpose of causing physical injury to another person, the person causes physical injury to another person by means of a deadly weapon other than a firearm;

(3) The person recklessly causes serious physical injury to another person:

(A) By means of a deadly weapon; or

(B) While operating or in actual physical control of a motor vehicle if at the time:

(i) The person is intoxicated; or

(ii) The alcohol concentration in the person's breath or blood is eight-hundredths (0.08) or more based upon the definition of alcohol concentration in § 5-65-204; or

(4) The person knowingly, without legal justification, causes physical injury to or incapacitates a person he or she knows to be:

(A)(i) A law enforcement officer, firefighter, code enforcement officer, or employee of a correctional facility while the law enforcement officer, firefighter, code enforcement officer, or employee of a correctional facility is acting in the line of duty.

(ii) As used in this subdivision (a)(4)(A):

(a)(1) “Code enforcement officer” means an individual charged with the duty of enforcing a municipal code, municipal ordinance, or municipal regulation as defined by a municipal code, municipal ordinance, or municipal regulation.

(2) “Code enforcement officer” includes a municipal animal control officer;

(b) “Employee of a correctional facility” includes a person working under a professional services contract with the Department of Correction, the Department of Community Correction, or the Division of Youth Services of the Department of Human Services;

(B) A teacher or other school employee while acting in the course of employment;

(C) An individual sixty (60) years of age or older or twelve (12) years of age or younger;

(D) An officer or employee of the state while the officer or employee of the state is acting in the performance of his or her lawful duty;

(E) While performing medical treatment or emergency medical services or while in the course of other employment relating to his or her medical training:

(i) A physician;

(ii) A person licensed as emergency medical services personnel, as defined in § 20-13-202;

(iii) A licensed or certified health care professional; or

(iv) Any other health care provider; or

(F) An individual who is incompetent, as defined in § 5-25-101.

(b) Battery in the second degree is a Class D felony.

**History.** Acts 1975, No. 280, § 1602; 1981, No. 877, § 1; 1983, No. 12, § 1; A.S.A. 1947, § 41-1602; Acts 1995, No. 1173, § 1; 1995, No. 1305, § 2; 1995, No. 1338, § 1; 1997, No. 207, § 1; 1997, No. 878, § 1; 1999, No. 389, § 1; 2003, No. 66, § 1; 2007, No. 827, § 27; 2009, No. 344, § 1; 2009, No. 689, § 1; 2011, No. 1120, § 6; 2011, No. 1168, § 1; 2013, No. 429, § 1.

**Amendments.** The 2009 amendment by No. 344, in (a)(4)(A), inserted “code enforcement officer” in (a)(4)(A)(i), inserted (a)(4)(A)(ii)(b) and redesignated the

remaining text of (a)(4)(A)(ii) accordingly, and made related changes.

The 2009 amendment by No. 689 rewrote (a)(4)(E)(ii).

The 2011 amendment by No. 1120 inserted the first instance of “code enforcement officer” in (a)(4)(A)(i).

The 2011 amendment by No. 1168 inserted “or incapacitates” in (a)(4).

The 2013 amendment substituted “another” for “any” in (a)(1) and (a)(2); inserted the (a)(3)(A) designation; and added (a)(3)(B).

## RESEARCH REFERENCES

**ALR.** Parts of Human Body, other than Feet, as Deadly or Dangerous Weapons or Instrumentalities for Purposes of Statutes

Aggravating Offenses such as Assault and Robbery. 67 A.L.R.6th 103.



## CASE NOTES

## ANALYSIS

In General.

Crime of Violence.

Defense or Justification.

Evidence.

Law Enforcement Officer.

Lesser Included Offenses.

Physical Injury.

Separate Offenses.

**In General.**

Collateral estoppel did not preclude the trial court from making a determination under 11 U.S.C.S. § 523(a)(6) on the issues of willfulness and maliciousness. It was not necessary to a criminal conviction for second-degree battery under this section that the debtor's actions be willful and malicious; furthermore, the fact that defendant stipulated to liability in a civil suit did not satisfy the "actually litigated" requirement. *Hidy v. Bullard* (In re Bullard), 451 B.R. 473, 451 B.R. 473 (Bankr. E.D. Ark. Jan. 21, 2011), *aff'd*, *Hidy v. Bullard* (In re Bullard), — B.R. —, 2011 Bankr. LEXIS 2151 (B.A.P. 8th Cir. June 14, 2011).

**Crime of Violence.**

Defendant's sentence as a career-offender under U.S. Sentencing Guidelines Manual § 4B1.1 was vacated because a district court erred by failing to apply the modified categorical approach to determine whether defendant's prior conviction for second-degree battery in violation of subsection (a) of this section was for a crime of violence. *United States v. Dawn*, 685 F.3d 790, 2012 U.S. App. LEXIS 13218 (8th Cir. June 28, 2012).

**Defense or Justification.**

Because second-degree battery has as one of its elements the infliction of serious physical injury, it is a "felony involving force or violence"; thus, in a second-degree murder case, the trial court erred by failing to give a jury instruction for justification that had both second-degree battery and unlawful deadly physical force alternatives since both were warranted by evidence that defendant was confronted by three men in an attack before he stabbed one of them in the heart with a pocket knife. *Hamilton v. State*, 97 Ark. App. 172, 245 S.W.3d 710 (2006).

Defendant's conviction for battery in the second degree was proper because he did not have a justification defense under § 5-2-608(a) since defendant's version of the events was unbelievable; any reasonable person would have realized that the victim was acting on behalf of a repossession agency and therefore, defendant could not have been acting on a reasonable belief that he was preventing a criminal trespass. Further, there was no evidence to indicate that the victim used force against defendant or threatened him with force. *Washington v. State*, 2010 Ark. App. 339, 374 S.W.3d 822 (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 379 (June 24, 2010).

**Evidence.**

Defendant's conviction for battery in the second degree was appropriate under §§ 5-13-202(a)(4)(C) and 5-2-202(2) because the evidence was clear that defendant intended to restrain the victim. The victim, defendant's mother-in-law, testified that defendant grabbed her, threw her into a chair, and pushed her down anytime the victim had tried to stand up. *LaFort v. State*, 98 Ark. App. 202, 254 S.W.3d 27 (2007).

Teacher's testimony alone was sufficient evidence of physical injury to support defendant juvenile's adjudication for second degree in violation of this section for striking the teacher in the arm because the teacher testified that after appellant hit her, the pain she suffered in her arm was of a sufficient nature to cause her to seek medical treatment, and she also testified that her arm was "very sore" for at least a week; while medical treatment is not required in order to establish a physical injury, the fact the pain was of a sufficient nature to cause the victim to seek medical care constitutes evidence that she experienced "substantial pain." *M. T. v. State*, 2009 Ark. App. 761, 350 S.W.3d 792 (2009).

Substantial evidence supported defendant's conviction for second-degree battery against a police officer in violation of subdivision (a)(4)(A)(i) of this section because a police officer testified that she injured her hand when defendant tackled her, and although the officer surmised that the injury could have occurred during

her pursuit of defendant, it was for the fact-finder to weigh the evidence and to determine when the injury occurred; the trier of fact could find that the officer injured her hand during the altercations with defendant and not during the foot chase. *Lee v. State*, 2010 Ark. App. 15, — S.W.3d — (2010).

Defendant's conviction for battery in the second degree in violation of subdivision (a)(2) of this section was appropriate because there was substantial evidence presented to support the determination that, with the purpose of causing physical injury to the victim, defendant caused physical injury to the victim by means of a deadly weapon other than a firearm, specifically, a metal steering wheel theft-protection device. *Washington v. State*, 2010 Ark. App. 339, 374 S.W.3d 822 (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 379 (June 24, 2010).

Evidence that defendant struck the victim in head with a chain-saw blade with the purpose of causing physical injury, supported a finding of second-degree battery. *Dooly v. State*, 2010 Ark. App. 591, 377 S.W.3d 471 (2010).

Once jury concluded that defendant's account of events was not truthful and that a hot instrument, not hot water, was what caused the burns to defendant's daughter, the evidence was consisted with defendant's conviction for second-degree battery. *McKnight v. State*, 2010 Ark. App. 598, 378 S.W.3d 173 (2010).

Defendant convicted of the lesser-included offense of second-degree battery waived a challenge to the sufficiency of the evidence supporting his conviction where he did not argue in his motions for directed verdict that an element of second-degree battery was not proven. *Chestang v. State*, 2012 Ark. App. 222, — S.W.3d — (2012).

Defendant's conviction for second-degree battery, in violation of subdivision (a)(4)(C) of this section, was supported by the evidence because the number of bruises on his girlfriend's 23-month-old son and the unusual force necessary to cause them, as testified to by an emergency room pediatrician, provided proof that he knowingly caused physical injury under § 5-2-202(2)(B). *Hahn v. State*, 2012 Ark. App. 297, — S.W.3d — (2012).

Substantial evidence supported a juvenile's second-degree battery disposition,

in violation of § subdivisions (a)(1)-(3) of this section, based on accomplice liability because a codefendant testified that the juvenile solicited and encouraged the plan to beat her boyfriend, who she suspected of cheating; the juvenile could be found guilty of the conduct of her accomplices who threw the punches. *L.C. v. State*, 2012 Ark. App. 666, — S.W.3d —, 2012 Ark. App. LEXIS 782 (Nov. 28, 2012).

### **Law Enforcement Officer.**

Trial court did not err by refusing to instruct a jury on third-degree battery as a lesser included offense of second-degree battery where there was no evidence tending to disprove that the victim was an employee of a correctional facility; there was testimony that referred to the victim as a "detention officer" and "jailer." *Davis v. State*, 97 Ark. App. 6, 242 S.W.3d 630 (2006).

### **Lesser Included Offenses.**

In a first-degree battery case, a trial court did not err by refusing to give an instruction on second-degree battery because it was not a lesser included offense; both alternatives given in the proffered instruction required an additional element, serious physical injury, that was not required in the first-degree battery instruction that was given, which only required physical injury when the injury was caused by a firearm. Further, the proffered instruction was not a lesser included offense because the offense was not an attempt offense, and the proffered instruction did not differ from the offense charged only in the respect that a less serious injury to the same person sufficed to establish the offense's commission. *Spight v. State*, 101 Ark. App. 400, 278 S.W.3d 599 (2008).

To the extent that defendant convicted of second-degree battery attempted to argue that the jury should have been instructed on third-degree battery as a lesser-included offense because the jury could have rationally found him to have recklessly caused the injuries to the victim, his argument was not preserved, because although he proffered an instruction on third-degree battery based on the first definition of third-degree battery in § 5-13-203(a), which involved purposely causing physical injury, there was no indication that he requested an instruction



based on the second definition in the statute, which involved recklessness. Defendant was thus procedurally barred from raising an argument based on an element of recklessness. *Lytle v. State*, 2012 Ark. App. 246, — S.W.3d — (2012).

**Physical Injury.**

Trial court did not err in refusing to direct the verdicts where defendant took actions to conceal the harm to the child, and failed to take action to secure appropriate care for the child; the jury could conclude that defendant rubbing a substance known to cause skin irritation on the face of a toddler where Superglue had already adhered would cause, at the very least, the impairment of physical condition or a visible mark associated with the physical trauma. *Price v. State*, 2009 Ark. App. 664, 344 S.W.3d 678 (2009).

**Separate Offenses.**

Trial court did not err in determining that consecutive sentencing for aggravated robbery, § 5-12-103(a)(1), first-de-

gree terroristic threatening, § 5-13-301(a)(1)(A), and second-degree battery, under subdivision (a)(2) of this section, did not violate the prohibition against double jeopardy in Ark. Const. Art. 2, § 8 and the Fifth Amendment because neither first-degree terroristic threatening nor second-degree battery was a lesser-included offense of aggravated robbery since both crimes required proof of additional facts not required by aggravated robbery; the offense of first-degree terroristic threatening requires the elements of threatening to cause the death of the victim and the purpose of terrorizing the victim, and a conviction for second-degree battery requires proof of purposely causing physical injury to the victim. *Walker v. State*, 2012 Ark. App. 61, 389 S.W.3d 10 (2012), review denied, — S.W.3d —, 2012 Ark. LEXIS 95 (Ark. Feb. 23, 2012).

**Cited:** *Hayes v. State*, 2009 Ark. App. 663, — S.W.3d — (2009); *Ross v. State*, 2012 Ark. App. 243, — S.W.3d — (2012).

**5-13-203. Battery in the third degree.**

**RESEARCH REFERENCES**

**ALR.** Parts of Human Body, other than Feet, as Deadly or Dangerous Weapons or Instrumentalities for Purposes of Statutes

Aggravating Offenses such as Assault and Robbery. 67 A.L.R.6th 103.

**CASE NOTES**

**ANALYSIS**

Evidence.  
Instructions.  
Lesser Included Offenses.

**Evidence.**

Evidence was sufficient to convict defendant of battery in the third degree under subdivision (a)(1) of this section because defendant admitted to purposely hitting the victim, the victim and two witnesses testified that the victim had an injury to the forehead following the incident, and an officer testified as to the victim's injury. *Beare v. State*, 2010 Ark. App. 544, — S.W.3d — (2010).

Trial court's finding that defendant violated the conditions of his suspended sentence by committing third-degree battery under subdivision (a)(1) of this section was

not clearly against the preponderance of the evidence, because two witnesses testified that defendant struck the victim multiple times in the face, causing cuts to his mouth and significant bleeding. *Knotts v. State*, 2012 Ark. App. 121, — S.W.3d — (2012).

**Instructions.**

Following a vehicle collision, defendant was charged with driving while intoxicated as a second offense, negligent homicide, first-degree battery, and aggravated assault. Defendant invited any error committed by the trial court in giving his requested instruction on third-degree battery that also included the element of physical injury caused by means of a deadly weapon under subdivision (a)(3) of this section. *Hayes v. State*, 2009 Ark. App. 663, — S.W.3d — (2009).

Court of appeals refused to consider

defendant's argument that the trial court abused its discretion in denying his proffered third-degree battery instruction because defendant did not make the argument to the trial court; defendant made no argument regarding the firearm or the mental state required for the proffer of his third-degree-battery instruction, and the trial court did not consider the third-degree instruction as it related to evidence other than the evidence surrounding a pool cue. *Reed v. State*, 2011 Ark. App. 352, 383 S.W.3d 881 (2011).

#### **Lesser Included Offenses.**

Trial court did not err by refusing to instruct a jury on third-degree battery as a lesser included offense of second-degree battery, in violation of § 5-13-202(a)(4)(A)(i), where there was no evidence tending to disprove that the victim was an employee of a correctional facility; there was testimony that referred to the victim as a "detention officer" and "jailer." *Davis v. State*, 97 Ark. App. 6, 242 S.W.3d 630 (2006).

To the extent that defendant convicted of second-degree battery attempted to argue that the jury should have been instructed on third-degree battery as a

lesser-included offense because the jury could have rationally found him to have recklessly caused the injuries to the victim, his argument was not preserved, because although he proffered an instruction on third-degree battery based on the first definition of third-degree battery in subsection (a) of this section, which involved purposely causing physical injury, there was no indication that he requested an instruction based on the second definition in the statute, which involved recklessness. Defendant was thus procedurally barred from raising an argument based on an element of recklessness. *Lytle v. State*, 2012 Ark. App. 246, — S.W.3d — (2012).

During parents' trial for first-degree battery against their infant, the court did not err in refusing to instruct the jury on the lesser-included offense of third-degree battery, in violation of subdivision (a)(2) of this section, because the physical injury the infant sustained could only be described as serious; the infant was severely malnourished to the point of starvation and death would have occurred within days without medical attention. *Bruner v. State*, 2013 Ark. 68, — S.W.3d — (2013).

### **5-13-204. Aggravated assault.**

(a) A person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he or she purposely:

(1) Engages in conduct that creates a substantial danger of death or serious physical injury to another person;

(2) Displays a firearm in such a manner that creates a substantial danger of death or serious physical injury to another person; or

(3) Impedes or prevents the respiration of another person or the circulation of another person's blood by applying pressure on the throat or neck or by blocking the nose or mouth of the other person.

(b) Aggravated assault is a Class D felony.

(c) The provisions of this section do not apply to:

(1) A law enforcement officer acting within the scope of his or her duty; or

(2) A person acting in self-defense or the defense of a third party.

**History.** Acts 1975, No. 280, § 1604; A.S.A. 1947, § 41-1604; Acts 2003, No. 1113, § 1; 2009, No. 332, § 1.

**Amendments.** The 2009 amendment inserted (a)(3) and made related and minor stylistic changes.



## CASE NOTES

## ANALYSIS

Acts Constituting Assault.  
 Defense or Justification.  
 Double Jeopardy.  
 Evidence.  
 Intent.  
 Lesser Included Offenses.

**Acts Constituting Assault.**

Defendant's conviction for aggravated assault was proper because there was evidence that defendant's conduct created a substantial risk of serious physical injury, as defined in § 5-1-102(21); defendant hit the victim with the butt of a pistol with sufficient force to knock the victim down, breaking facial bones and causing the victim's eye to swell shut. *Pitts v. State*, 2012 Ark. App. 228, — S.W.3d — (2012).

**Defense or Justification.**

Because defendant presented evidence arguably supporting self defense or a justification defense to a charge of aggravated assault under Arkansas law, the government had to negate that defense by a preponderance of the evidence for an enhancement for using the firearm in connection with another felony offense under U.S. Sentencing Guidelines Manual § 2K2.1(b)(5) [now (b)(6)] (2005), to apply because whether circumstances negated defendant's excuse or justification was an element of the offense under § 5-1-102(5)(C), which had to be proved by the state under § 5-1-111(a)(1), and the definition of aggravated assault expressly excluded any person acting in self-defense or the defense of a third party under subdivision (c)(2) of this section. *United States v. Raglin*, 500 F.3d 675 (8th Cir. 2007).

Preponderance of the evidence supported the district court's finding that defendant's use of deadly physical force under § 5-2-601(2) and (6)(B), which occurred when he pointed a loaded pistol at an undercover officer, was not justified or in self defense, and thus, he was guilty of the felony of aggravated assault under Arkansas law, and the four-level enhancement under U.S. Sentencing Guidelines Manual § 2K2.1(b)(5) [now (b)(6)] was properly imposed because (1) defendant did not act in self-defense within the

meaning of subdivision (c)(2) of this section as he used deadly force against men who had obeyed his command to leave his property and who were loitering on the public sidewalk in front of his house as there was no evidence they were imminently endangering defendant's life under § 5-2-607(a); (2) under § 5-2-607(b)(1), defendant could not use deadly force after he had retreated safely to his house and returned later, unprovoked, to threaten the men; (3) defendant's conduct was not justified as permissible defense of his property within the purview of § 5-2-608 because use of deadly physical force was not authorized by § 5-2-607, and he had no reason to believe that the men who had quietly obeyed a command to leave his property would come back to commit arson or burglary; and (4) defendant's conduct was not justified to defend his home under § 5-2-620 because the men defendant assaulted were not attempting to enter his home, so the statute did not apply. *United States v. Raglin*, 500 F.3d 675 (8th Cir. 2007).

Denial of defendant's motion for a brain injury examination did not deprive defendant of a basic tool for his defense as defendant was examined by a psychologist and he failed to object to the admission of the psychologist's report into evidence; defendant could not assert that failure to appoint a head-injury expert rose to the level of protection afforded by the third Wicks exception as (1) defendant was given an opportunity by the trial court to renew the motion for an appointment of the expert but he failed to do so, (2) it was not the trial court's duty to adequately prepare and present defendant's defense, and (3) defendant's argument could not be reviewed as an issue that fell within the purview of Ark. R. App. P. Crim. 10(b)(iv) because it was not a serious error requiring the trial court to intervene and issue an admonition or declare a mistrial. *Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006), cert. denied, 550 U.S. 939, 127 S. Ct. 2257, 167 L. Ed. 2d 1100 (2007).

Trial court did not err in sustaining state's objection that the terms of the civil dispute regarding a loan and the collateral for the loan were irrelevant and in refusing to permit defendant to question

the victim concerning the property that had been collateral for the loan because, even if the victim had lied regarding the terms of the loan, that would be no defense to the crimes for which he was convicted, which included kidnapping, terroristic threatening, and aggravated assault. *Tarpley v. State*, 97 Ark. App. 122, 245 S.W.3d 192 (2006).

### **Double Jeopardy.**

Defendant's convictions for aggravated assault in and use of a firearm in commission of a felony in violation of § 16-90-120 did not subject defendant to double jeopardy as the § 16-90-120 conviction was used to enhance defendant's sentence. *Davis v. State*, 93 Ark. App. 443, 220 S.W.3d 248 (2005).

### **Evidence.**

Evidence was sufficient to sustain defendant's conviction for aggravated assault and aggravated assault on a family member when, among other things, evidence showed that defendant drove a car in an attempt to run over the victim, the father of her child, and his girlfriend. *Williams v. State*, 96 Ark. App. 277, 241 S.W.3d 290 (2006).

Defendant's convictions were supported by substantial evidence where it was shown that (1) shortly after the incident, defendant had a blood-alcohol level of .23 percent, (2) defendant was driving the car that hit two women and narrowly missed a third, (3) just before the impact, defendant was witnessed to speed up and actually swerve the vehicle toward the women's path, and (4) defendant drove away after the impact. *Estacuy v. State*, 94 Ark. App. 183, 228 S.W.3d 567 (2006).

Offense of terroristic threatening required no more than the communication of a threat, by word or deed, with the purpose of terrorizing the victim, and the offense of aggravated assault was accomplished when defendant displayed the gun and pointed it at the victim; given the testimony that defendant kept the doorway blocked for several minutes after performing those acts and that the victim was prevented from summoning assistance during that time, the evidence was sufficient to sustain the kidnapping conviction. *Tarpley v. State*, 97 Ark. App. 122, 245 S.W.3d 192 (2006).

Substantial evidence supported defendant's convictions for aggravated robbery,

kidnapping, aggravated assault, theft of property, unlawful discharge of a firearm from a vehicle, and fleeing because while the state did not prove that defendant actually entered a bank, it did provide substantial evidence that he was the driver of the getaway car and thus was an accomplice of the two men who committed the aggravated robbery, kidnapping, and theft of property; after an officer turned on his blue lights, defendant accelerated to a speed of 100 miles per hour and struck an SUV, causing it to flip and resulting in injuries to the driver, and that conduct sufficiently satisfied the elements of aggravated assault and fleeing. *Barber v. State*, 2010 Ark. App. 210, 374 S.W.3d 709 (2010).

Although there was not substantial evidence to support defendant's convictions for aggravated assault pursuant to subsection (a) of this section with respect to defendant sideswiping a victim's vehicle on an interstate, under § 5-1-110(b), the evidence would clearly sustain convictions for the lesser-included offense of first degree assault under § 5-13-205(a); the testimony established defendant acted recklessly when he approached the victim's vehicle from the rear, going very fast, and in passing the victim's vehicle on the left, defendant sideswiped the vehicle. *Mance v. State*, 2010 Ark. App. 472, — S.W.3d — (2010).

Evidence was sufficient to sustain an aggravated assault conviction under this section because defendant had complete control of his pit bull, and he directed the dog to attack an officer; by instructing his dog to "get" the officer, defendant intentionally engaged in conduct that put the officer at risk of being bitten by the dog. *Banks v. State*, 2011 Ark. App. 249, — S.W.3d — (2011).

Although the circuit court erred in allowing the results of defendant's blood-alcohol test into evidence since the state failed to provide evidence that the blood was drawn by a physician or a person acting under the direction and supervision of a physician as required by this section, defendant was properly convicted of negligent homicide in violation of § 5-10-105 and aggravated assault in violation of this section because there was overwhelming evidence of defendant's intoxication; while the only evidence regarding the concentration of alcohol in defen-



dant's blood came from the blood test, there was sufficient evidence at trial to support defendant's conviction on the alternative theory that defendant negligently caused the victim's death as a result of operation of a motor vehicle while intoxicated. *Bates v. State*, 2011 Ark. App. 446, 384 S.W.3d 654 (2011).

#### **Intent.**

Sufficient evidence established defendant had the necessary purposeful intent, as defined in § 5-2-202(1), to commit aggravated assault in violation of subsection (a) of this section with respect to a vehicular incident on a local road because the victim testified defendant stopped his car, put it in reverse, and rammed into the victim's vehicle enough times and with enough force to cause her vehicle to spin; the victim's testimony constituted substantial evidence that it was defendant's conscious object to engage in conduct that created a substantial danger of death or serious physical injury to the victim and her infant son, who was also in the car. *Mance v. State*, 2010 Ark. App. 472, — S.W.3d — (2010).

Substantial evidence supported a finding that defendant had the required pur-

pose for aggravated assault when he discharged a gun in the direction of a step that was three steps down from where the victim was standing. Defendant's explanation of the gun accidentally firing did not match the physical evidence of bullet fragments found near a pock mark on the first step to the front porch and both the victim (an officer who had not identified himself) and defendant being wounded. *Montalvo v. State*, 2012 Ark. App. 119, — S.W.3d — (2012).

#### **Lesser Included Offenses.**

Trial court did not err in refusing to instruct the jury on aggravated assault during defendant's trial for aggravated robbery because aggravated assault, in violation of subdivisions (a)(1) and (2) of this section, was not a lesser-included offense of aggravated robbery pursuant to § 5-1-110(b)(1) as the two offenses required different elements of proof; aggravated assault required proof of circumstances manifesting extreme indifference to the value of human life, whereas aggravated robbery did not require such proof. *Matthews v. State*, 2009 Ark. 321, 319 S.W.3d 266 (2009).

### **5-13-205. Assault in the first degree.**

(a) A person commits assault in the first degree if he or she:

(1) Recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person; or

(2) Purposely impedes or prevents the respiration of another person or the circulation of another person's blood by applying pressure on the throat or neck or by blocking the nose or mouth of the other person.

(b) Assault in the first degree is a Class A misdemeanor.

(c) It is a defense to prosecution under subdivision (a)(2) of this section if the other person consented to the impeding or prevention of his or her respiration or circulation of blood.

**History.** Acts 1975, No. 280, § 1605; A.S.A. 1947, § 41-1605; Acts 2009, No. 332, § 2.

**Amendments.** The 2009 amendment,

in (a), inserted (a)(2), redesignated the remaining text accordingly, and made related changes; and added (c).

## CASE NOTES

## ANALYSIS

Intent.

Lesser Included Offenses.

**Intent.**

By loading a shotgun and pointing it at the victims, defendant purposely created a substantial danger of death or physical injury under circumstances manifesting an extreme indifference to the value of human life; therefore, the evidence supported her conviction for aggravated assault under this section. It was not required that she intend harm to the victims. *Warden v. State*, 2011 Ark. App. 75, 381 S.W.3d 140 (2011).

**Lesser Included Offenses.**

Although there was not substantial evidence to support defendant's convictions

for aggravated assault pursuant to § 5-13-204(a) with respect to defendant sideswiping a victim's vehicle on an interstate, under § 5-1-110(b), the evidence would clearly sustain convictions for the lesser-included offense of first degree assault under subsection (a) of this section; the testimony established defendant acted recklessly when he approached the victim's vehicle from the rear, going very fast, and in passing the victim's vehicle on the left, defendant sideswiped the vehicle. *Mance v. State*, 2010 Ark. App. 472, — S.W.3d — (2010).

**Cited:** *Mullins v. State*, 2009 Ark. App. 570, — S.W.3d — (2009).

**5-13-206. Assault in the second degree.**

## CASE NOTES

**Evidence.**

Where defendant, a police officer, was charged with second-degree assault for choking an arrestee during the booking process, assuming that a special agent of the state police was qualified as an expert to testify as to the appropriate charging

decision, the proffered testimony was properly excluded as it would have invaded the role of the jury as to the determination of the ultimate issue. *Clark v. State*, 2012 Ark. App. 496, — S.W.3d — (2012).

**5-13-207. Assault in the third degree.**

## CASE NOTES

## ANALYSIS

Acts Constituting Assault.  
Evidence.

**Acts Constituting Assault.**

Where defendant admitted that he committed third-degree assault against victim by kicking and banging at the victim's door in an attempt to gain entry, the circuit court did not err in denying defendant's motion for directed verdict on the attempted burglary charge as defendant completed a substantial step towards entry by severely damaging victim's door and left only when the police were in the area. *Davis v. State*, 368 Ark. 380, 368 Ark. 351, 246 S.W.3d 433 (2007).

**Evidence.**

Defendant's motion for directed verdict was properly denied where there was sufficient evidence to convict defendant of residential burglary, § 5-39-201(a)(1), and third degree assault; defendant took steps to hinder the victim's ability to summon help by turning off the power and pulling out the phone lines, and the fact that defendant had a potentially deadly weapon on his person could at least raise an inference that he intended to, at the very least, place victim in fear for her physical well-being. *Diggs v. State*, 93 Ark. App. 332, 219 S.W.3d 654 (2005).



5-13-209. Abuse of athletic contest officials.

- (a) A person commits abuse of an athletic official if, with the purpose of causing physical injury to another person, the person strikes or otherwise physically abuses an athletic contest official immediately prior to, during, or immediately following an interscholastic, intercollegiate, or any other organized amateur or professional athletic contest in which the athletic contest official is participating.
- (b) Abuse of an athletic official is a Class A misdemeanor.

**History.** Acts 1987, No. 355, § 1; 2007, No. 827, § 28.

5-13-211. Aggravated assault upon a certified law enforcement officer or an employee of a correctional facility.

- (a) A person commits aggravated assault upon a certified law enforcement officer or an employee of a correctional facility if, under circumstances manifesting extreme indifference to the personal hygiene of the certified law enforcement officer or employee of the correctional facility, the person purposely engages in conduct that creates a potential danger of infection to the certified law enforcement officer or an employee of any state or local correctional facility while the certified law enforcement officer or employee of the state or local correctional facility is engaged in the course of his or her employment by causing a person whom the actor knows to be a certified law enforcement officer or employee of the state or local correctional facility to come into contact with saliva, blood, urine, feces, seminal fluid, or other bodily fluid by purposely throwing, tossing, expelling, or otherwise transferring the fluid or material.
- (b) Aggravated assault upon a certified law enforcement officer or an employee of a correctional facility is a Class D felony.

**History.** Acts 1997, No. 1235, § 1; 2003, No. 1271, § 1; 2011, No. 277, § 1.

**Amendments.** The 2011 amendment inserted “a certified law enforcement officer” with minor variations throughout the

section; and, in (a) inserted “a person whom the actor knows to be a certified law enforcement officer or,” “purposely,” and “or otherwise transferring.”

CASE NOTES

ANALYSIS

Defense.  
Evidence Sufficient to Revoke Suspended Sentence.  
Information.

**Defense.**  
Motion to dismiss was properly denied with respect to aggravated assault on a

correctional facility employee under subsection (a) of this section and first-degree terroristic threatening because voluntary intoxication was not a defense. Also, a jury could have reasonably concluded that appellant purposely caused his saliva to come into contact with an officer; the trial court found that the act of purposefully expelling bodily fluid onto the officer’s person satisfied the “potential danger” re-

quirement of the assault offense. *Green v. State*, 2012 Ark. App. 315, — S.W.3d — (2012).

### **Evidence Sufficient to Revoke Suspended Sentence.**

Defendant's suspended sentence was properly revoked based on committing an aggravated assault upon an employee of a correctional facility in violation of this section because there was ample evidence that he purposely spat on a deputy, resulting in his saliva coming in contact with the deputy under circumstances manifesting an extreme indifference to the depu-

ty's personal hygiene. *Foster v. State*, 104 Ark. App. 108, 289 S.W.3d 476 (2008).

### **Information.**

Defendant's claim that the state was required to prove the more onerous version of this statute was without merit as he failed to object to the sufficiency of the information before trial; further, defendant's claim could not prevail as he failed to show he was convicted under a statute that was no longer in effect. *Barnes v. State*, 94 Ark. App. 321, 230 S.W.3d 311 (2006).

## **SUBCHAPTER 3 — TERRORISM**

### **SECTION.**

5-13-310. Terroristic act.

### **5-13-301. Terroristic threatening.**

#### **CASE NOTES**

##### **ANALYSIS**

Communication of Threat.

Defenses.

Evidence.

—Sufficient.

Jury Instructions.

Separate Offenses.

### **Communication of Threat.**

Defendant's conviction for first-degree terroristic threatening pursuant to subdivision (a)(1)(A) of this section could not stand because there was no evidence, either direct or circumstantial, that it was defendant's conscious object that his threatening statements, made to his girlfriend, be communicated to the victim, his former wife. *Turner v. State*, 2010 Ark. App. 214, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 258 (May 6, 2010).

### **Defenses.**

Trial court did not err in sustaining state's objection that the terms of the civil dispute regarding a loan and the collateral for the loan were irrelevant and in refusing to permit defendant to question the victim concerning the property that had been collateral for the loan because, even if the victim had lied regarding the terms of the loan, that would be no de-

fense to the crimes for which he was convicted, which included kidnapping, terroristic threatening, and aggravated assault. *Tarpley v. State*, 97 Ark. App. 122, 245 S.W.3d 192 (2006).

### **Evidence.**

Offense of terroristic threatening required no more than the communication of a threat - by word or deed - with the purpose of terrorizing the victim, and the offense of aggravated assault was accomplished when defendant displayed the gun and pointed it at the victim; given the testimony that defendant kept the doorway blocked for several minutes after performing those acts and that the victim was prevented from summoning assistance during that time, the evidence was sufficient to sustain the kidnapping conviction. *Tarpley v. State*, 97 Ark. App. 122, 245 S.W.3d 192 (2006).

While defendant was staying with his girlfriend's family, he engaged in a verbal and physical altercation with the homeowner and his brother; during the melee, defendant pointed a gun at the victims, threatened to kill them, broke the kitchen window, and repeatedly struck the sliding-glass door. The Court of Appeals of Arkansas held that sufficient evidence supported defendant's conviction for first-degree terroristic threatening in violation



of subdivision (a)(1)(A) of this section; the evidence presented to the jury was sufficient to show that defendant's purpose in wielding the gun was to terrorize both victims. *Mullins v. State*, 2009 Ark. App. 570, — S.W.3d — (2009).

State produced evidence that defendant pointed a gun at the victim and indicated more than one time that he would kill her, and the natural and probable result of such acts was that the person toward whom they were directed would be filled with intense fright; the state produced substantial evidence to support a finding that defendant acted with the intent of terrorizing the victim. *Lasker v. State*, 2009 Ark. App. 591, — S.W.3d — (2009).

Evidence was sufficient to support defendant's conviction for second-degree terroristic threatening in violation of subdivision (b)(1) of this section because the victim's testimony that defendant said, "Give me the gun, I'll shoot him," constituted sufficient evidence to support the conviction. *Sims v. State*, 2010 Ark. App. 133, — S.W.3d — (2010).

Pregnant wife's testimony that appellant pushed and threatened her — causing red marks on her neck and arm — was sufficient to prove by a preponderance that appellant violated the conditions of his suspended sentence by committing the criminal offenses of domestic battery in third degree, pursuant to § 5-26-305(b)(2)(A), and terroristic threatening in the second degree, under subdivision (b)(1) of this section. *Autrand v. State*, 2010 Ark. App. 245, — S.W.3d — (2010).

Evidence was sufficient to revoke defendant's suspended sentences due to his violation of conditions by second-degree terroristic threatening because the victim testified that defendant threatened to "get" her, which she interpreted as a threat to kill her. *Brown v. State*, 2010 Ark. App. 336, — S.W.3d — (2010).

As defendant hit the victim (his ex-wife's mother) in the head with the baseball bat and cut the victim's throat, threatened his ex-wife, and forced her to go with him from the scene of the crime, the evidence was sufficient to convict defendant of first-degree murder, kidnapping, and terroristic threatening under §§ 5-10-102(a)(2), 5-11-102(a), and subdivision (a)(1)(A) of this section. *Alvard v. State*, 2011 Ark. App. 160, — S.W.3d — (2011).

Evidence was sufficient to convict defendant of terroristic threatening because a dispatcher testified that the dispatcher received a 911 call from defendant's wife regarding a domestic disturbance; the wife said that defendant choked her and threatened to kill her and "take her out." *Mathis v. State*, 2012 Ark. App. 285, — S.W.3d — (2012).

Notwithstanding testimony that the alleged victim of terroristic threatening was a heavy drinker whose personality and memory changed when she was under the influence, the jury was entitled to believe the victim's testimony that defendant threatened to kill her if she reported that he had raped her and that she was scared to report the crime due to defendant's threat, particularly where there was testimony by another that defendant had admitted to having threatened the victim that he would kill her if she told anyone about the rape. The believability of the victim was a function for the jury as the fact-finder, not the reviewing court. *Harris v. State*, 2012 Ark. App. 651, — S.W.3d —, 2012 Ark. App. LEXIS 765 (Nov. 14, 2012).

#### —Sufficient.

Evidence that two independent witnesses stated that they heard defendant threaten the victims, telling the victims defendant would find out where the victims lived and kill them, and that defendant's objective was to frighten the victims with death or serious injury by threatening them, was sufficient to support a conviction for terroristic threatening in the first degree under subdivision (a)(1)(A) of this section. *Tatum v. State*, 2011 Ark. App. 80, 381 S.W.3d 124 (2011).

Defendant's convictions for residential burglary and terroristic threatening, in violation of § 5-39-201(a) and subdivision (b)(1) of this section were supported by sufficient evidence, as he entered his ex-wife residence with the intent or purpose of assaulting her or of threatening either her or her boyfriend. *Cash v. State*, 2011 Ark. App. 493, — S.W.3d — (2011).

#### Jury Instructions.

In defendant's trial for rape and terroristic threatening in the first degree in violation of subdivision (a)(1)(A) of this section, in which the victim testified that after defendant raped her for the first

time, he told her if she said anything about the rape he would kill her, the evidence did not authorize a jury instruction on the offense of terroristic threatening in the second degree. *Green v. State*, 2012 Ark. 19, 386 S.W.3d 413 (2012).

**Separate Offenses.**

Trial court did not err in determining that consecutive sentencing for aggravated robbery, § 5-12-103(a)(1), first-degree terroristic threatening, under subdivision (a)(1)(A) of this section, and second-degree battery, § 5-13-202(a)(2), did not violate the prohibition against double jeopardy in Ark. Const. Art. 2, § 8 and the

Fifth Amendment because neither first-degree terroristic threatening nor second-degree battery was a lesser-included offense of aggravated robbery since both crimes required proof of additional facts not required by aggravated robbery; the offense of first-degree terroristic threatening requires the elements of threatening to cause the death of the victim and the purpose of terrorizing the victim, and a conviction for second-degree battery requires proof of purposely causing physical injury to the victim. *Walker v. State*, 2012 Ark. App. 61, 389 S.W.3d 10 (2012), review denied, — S.W.3d —, 2012 Ark. LEXIS 95 (Ark. Feb. 23, 2012).

**5-13-310. Terroristic act.**

(a) A person commits a terroristic act if, while not in the commission of a lawful act, the person:

(1) Shoots at or in any manner projects an object at a conveyance which is being operated or which is occupied by another person with the purpose to cause injury to another person or damage to property; or

(2) Shoots at an occupiable structure with the purpose to cause injury to a person or damage to property.

(b)(1) Upon conviction, any person who commits a terroristic act is guilty of a Class B felony.

(2) Upon conviction, any person who commits a terroristic act is guilty of a Class Y felony if the person with the purpose of causing physical injury to another person causes serious physical injury or death to any person.

(c) This section does not repeal any law or part of a law in conflict with this section, but is supplemental to the law or part of a law in conflict.

**History.** Acts 1975, No. 312, §§ 1-3; 544, § 1; 2005, No. 197, § 1; 2007, No. 1979, No. 428, § 1; A.S.A. 1947, §§ 41-1651, 41-1652, 41-1652n; Acts 1993, No. 827, § 29.

**CASE NOTES**

**ANALYSIS**

Elements.  
Multiple Offenses.  
Sentencing.  
Sufficiency of Evidence.

**Elements.**

There was no violation of defendant's rights under § 5-1-110(a)(4) because when comparing the elements of the two offenses it was evident that the conduct of

committing a terroristic act under this section was not a specific instance of conduct constituting first-degree battery under § 5-13-201. *Warren v. State*, 103 Ark. App. 124, 286 S.W.3d 768 (2008).

**Multiple Offenses.**

In a case involving terroristic acts, where three shots were fired into an automobile, because each terroristic act was a separate offense that could have been committed with or without a firearm, each



crime was subject to a firearm enhancement under § 16-90-120. *McKeever v. State*, 367 Ark. 374, 240 S.W.2d 583 (2006).

After defendant was convicted of three counts of committing a terroristic act, in violation of subdivision (a)(1) of this section, the trial court did not err in imposing multiple firearm enhancements because defendant committed three separate criminal offenses, and each offense was committed with a firearm. *McKeever v. State*, 367 Ark. 374, 240 S.W.3d 583 (2006).

### **Sentencing.**

Where defendant was convicted of multiple offenses and sentenced to 240 months for committing a terroristic act under this section and 192 months for domestic battery under § 5-26-303(a)(3), the enhancement of his sentence on both charges by 144 months pursuant to § 16-90-120 did not result in his sentence being enhanced twice for using a deadly weapon because the use of a firearm was not an element the prosecution had to prove to obtain his convictions. *King v. State*, 2012 Ark. App. 94, — S.W.3d — (2012).

### **Sufficiency of Evidence.**

In a case involving terroristic acts, the exclusion of a computer-generated threat to bolster a self-defense claim under § 5-2-606 was error since the evidence was relevant under Ark. R. Evid. 401; however, the error was harmless since evidence of other threats could have been elicited. *McKeever v. State*, 367 Ark. 374, 240 S.W.2d 583 (2006).

Evidence was sufficient to convict defendant of capital murder and a terroristic act when a witness, a retired deputy sheriff, described the perpetrator of a shooting, and defendant matched the description; moreover, a witness testified as to a possible motive, and defendant's relative testified that defendant had asked the relative to lie for defendant. *Stephenson v. State*, 373 Ark. 134, 282 S.W.3d 772 (2008).

Evidence that included defendant's firing a shot in the direction of a victim's truck, testimony of two individuals that on separate occasions defendant told them he had shot a man, and defendant's evading the responding police was sufficient to convict defendant of commission of a ter-

roristic act in violation of this section. *Warren v. State*, 103 Ark. App. 124, 286 S.W.3d 768 (2008).

Where defendant stepped out of his motel room and fired a .45 caliber semiautomatic pistol through the windshield of a nearby car, striking all three occupants and killing two of them, the evidence was sufficient to support defendant's conviction of committing a terroristic act under subdivisions (a)(1)(A) and (B) of this section as to the third victim because the evidence established that the third victim was shot in the foot, and the court rejected defendant's argument that the evidence was insufficient for failing to establish that the victim suffered a "serious physical injury" as that term is defined in § 5-1-102(21). The evidence was sufficient to establish that the victim suffered a serious physical injury because the victim suffered a gunshot wound from a .45 caliber semiautomatic pistol that was serious enough to warrant emergency medical care, the victim continued to experience pain and tenderness while walking and was often unable to wear shoes due to the lasting effects of the wound, and the victim was unable to participate in activities that he enjoyed before sustaining the injury, such as playing basketball, and had visible scarring from the entry and exit of the bullet; this evidence was sufficient to support the jury's factual finding that the victim suffered a serious physical injury as a result of defendant's actions. *Butler v. State*, 2009 Ark. App. 695, 371 S.W.3d 699 (2009).

Evidence that defendant shot his wife four times as she sat in her vehicle was sufficient to support his conviction for terroristic acts under this section, which only required proof that defendant shot at a "conveyance" occupied by the wife with the purpose of injuring her. *Frost v. State*, 2010 Ark. App. 163, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 289 (Mar. 31, 2010).

In a case in which defendant was found guilty on three counts of attempted first-degree murder, of being a felon in possession of a firearm, and three counts of committing a terroristic act, he unsuccessfully argued that substantial evidence did not support his convictions; while the evidence was circumstantial, substantial evidence supported the conclusion that de-

fendant committed the crimes in question. Moments after the shooting, a dark-colored car was observed speeding away from the area without its lights on even though it was dark outside, that car crashed into another vehicle five blocks from the shooting, a witness positively identified defendant as the person who emerged from the driver's side of the car carrying a long rifle, shell casings from a rifle were recovered from the scene of the shooting, defendant's DNA was found on the driver's side airbag of the car, and the car contained a letter addressed to defendant. *Smith v. State*, 2010 Ark. App. 216, — S.W.3d — (2010).

Shot fired at the victims' house, the intruders' clear intent to rob the victims, the earlier threat to kill the victims, and the testimony that one of the intruders

turned around and started shooting while he was being chased out of the house was sufficient to convict defendant of committing terroristic acts under subdivision (a)(2) of this section. *Davis v. State*, 2012 Ark. App. 362, — S.W.3d — (2012).

Evidence was sufficient to sustain defendant's conviction for committing a terroristic act because, after initially shooting at the victim, defendant fired his weapon two more times as the victim was in the process of shutting his door. The natural and probable consequences of defendant's action in continuing to shoot as the door was closing resulted in the bullets striking the trailer, even though defendant aimed with the purpose of causing personal injury. *Wells v. State*, 2012 Ark. App. 596, — S.W.3d —, 2012 Ark. App. LEXIS 718 (Oct. 24, 2012).

CHAPTER 14  
SEXUAL OFFENSES

SUBCHAPTER.

- 1. GENERAL PROVISIONS.
- 2. MEDICAL RECORDS OF PERSONS CHARGED WITH SEX CRIMES.

RESEARCH REFERENCES

**Ark. L. Notes.** Sheppard, Arkansas 1, Arkansas Law, 2003 Arkansas L. Notes  
Texas 0: Sodomy Law Reform and the 87.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 5-14-101. Definitions.
- 5-14-103. Rape.
- 5-14-110. Sexual indecency with a child.
- 5-14-112. Indecent exposure.
- 5-14-122. Bestiality.
- 5-14-124. Sexual assault in the first degree.
- 5-14-125. Sexual assault in the second degree.
- 5-14-126. Sexual assault in the third degree.
- 5-14-127. Sexual assault in the fourth degree.
- 5-14-128. Registered offender living near school, public park, youth

SECTION.

- center, or daycare prohibited.
- 5-14-129. Registered offender working with children prohibited.
- 5-14-130. Registered offender — Incorrect permanent physical address on identification cards or driver's license prohibited.
- 5-14-131. Registered offender living near victim or having contact with victim prohibited.
- 5-14-132. Registered offender prohibited from entering upon school campus — Exception.



## SECTION.

5-14-133. Registered offender prohibited from entering a water park owned or operated by a local government.

5-14-134. Registered offender prohibited

from entering a swimming area or children's playground contained within an Arkansas State Park.

**Effective Dates.** Acts 2007, No. 38, § 3: Jan. 30, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the current penalty classification for the offense of indecent exposure is not adequate to protect the children in this state from repeat offenders; that the Internet is being used as a tool by people that are attempting to sexually victimize children in the State of Arkansas; that the current penalty classification for the offense of Internet stalking of a child in certain situations is not adequate to protect the children in this state; and that this act is immediately necessary because of the public risk posed by sexual predators. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2007, No. 392, § 2: Mar. 20, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the need to maintain correct information regarding the location of the residences of sex offenders is necessary to ensure the safety of the citizens of the State of Arkansas; that the provisions of this act will require sex offenders to maintain correct information on identification cards and driver's licenses; and that this act is necessary because of the public risk posed by sex offenders. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is

neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2007, No. 394, § 11: Mar. 21, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the need to register and verify registration of sex offenders and sexually violent predators is necessary to ensure the safety of the citizens of the State of Arkansas; that the provisions of this act will improve the process of registering and verifying the registration of sex offenders and sexually violent predators; and that this act is necessary because of the public risk posed by sex offenders and sexually violent predators. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2011, No. 816, § 2: Mar. 30, 2011. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that high-level sex offenders oftentimes target young children as victims; that during the summer months, water parks are popular destinations for young children; and that this act is immediately necessary in order to have it effective before the late spring and summer of this year, when children will begin to go to water parks. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The

date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

Acts 2013, No. 39, § 2: Feb. 6, 2013. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that high-level sex offenders often target young children as victims; that during the summer months, state parks are popular destinations for families with young children, especially those with a swimming area or a playground; and that this act is immediately necessary in order for it to be effective before the late spring and summer of this year when children will begin to go to state parks. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may

veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

Acts 2013, No. 210, § 3: Mar. 1, 2013. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that pregnancy from rape against women occurs; that women who get pregnant as a result of rape and decide to carry their pregnancy to term should not have a lifetime tethered to their rapists due to custody issues; and that this act is immediately necessary to eliminate the possibility that a rapist convicted in a court of law can have custody rights to any child conceived and born from such a rape. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

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## 5-14-101. Definitions.

As used in this chapter:

(1) “Deviate sexual activity” means any act of sexual gratification involving:

(A) The penetration, however slight, of the anus or mouth of a person by the penis of another person; or

(B) The penetration, however slight, of the labia majora or anus of a person by any body member or foreign instrument manipulated by another person;

(2) “Forcible compulsion” means physical force or a threat, express or implied, of death or physical injury to or kidnapping of any person;

(3) “Guardian” means a parent, stepparent, legal guardian, legal custodian, foster parent, or any person who by virtue of a living arrangement is placed in an apparent position of power or authority over a minor;

(4)(A) “Mentally defective” means that a person suffers from a mental disease or defect that renders the person:

(i) Incapable of understanding the nature and consequences of a sexual act; or

(ii) Unaware a sexual act is occurring.



- (B) A determination that a person is mentally defective shall not be based solely on the person’s intelligence quotient;
- (5) “Mentally incapacitated” means that a person is temporarily incapable of appreciating or controlling the person’s conduct as a result of the influence of a controlled or intoxicating substance:
  - (A) Administered to the person without the person’s consent; or
  - (B) That renders the person unaware a sexual act is occurring;
- (6) “Minor” means a person who is less than eighteen (18) years of age;
- (7) “Physically helpless” means that a person is:
  - (A) Unconscious;
  - (B) Physically unable to communicate a lack of consent; or
  - (C) Rendered unaware a sexual act is occurring;
- (8) “Public place” means a publicly or privately owned place to which the public or a substantial number of people have access;
- (9) “Public view” means observable or likely to be observed by a person in a public place;
- (10) “Sexual contact” means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female; and
- (11) “Sexual intercourse” means penetration, however slight, of the labia majora by a penis.

**History.** Acts 1975, No. 280, § 1801; 1985, No. 327, § 1; 1985, No. 563, § 1; A.S.A. 1947, § 41-1801; Acts 1995, No. 525, § 1; 2001, No. 1724, § 1; 2009, No. 748, § 7.

**Amendments.** The 2009 amendment added present (6) and redesignated remaining subdivisions accordingly.

CASE NOTES

ANALYSIS

- Deviate Sexual Activity.
- Evidence.
- Forceful Compulsion.
- Guardian.
- Penetration.
- Physically Helpless.
- Sexual Contact.
- Sexual Gratification.
- Sexual Intercourse.

**Deviate Sexual Activity.**

Where the victim testified that defendant touched her “in a bad way” on ten occasions beginning when she was six and stated that on four occasions he made her touch his “weeny” and “go up and down on it”, the testimony was sufficient to find that defendant engaged in “deviate sexual activity”. *Cox v. State*, 93 Ark. App. 419, 220 S.W.3d 231 (2005).

Defendant’s conviction for rape was upheld where the 16-year-old victim’s testimony about her physical symptoms, when coupled with the testimony of the other witnesses, provided circumstantial evidence of penetration, which was an element of both rape by sexual intercourse and rape by deviate sexual activity. *Marshall v. State*, 94 Ark. App. 34, 223 S.W.3d 74 (2006).

Defendant’s conviction for rape of his infant daughter was affirmed as the child showed signs of sexual abuse, including tears to the labia majora and minora that were consistent with trauma, immediately after being left with defendant, and defendant’s semen was found on the child’s diaper; thus, evidence was sufficient to find defendant engaged in deviate sexual activity. *Terry v. State*, 366 Ark. 441, 236 S.W.3d 495 (2006).

Evidence was sufficient to sustain de-

fendant's rape conviction because defendant admitted that the six-year-old victim put her mouth on his penis and gave him oral sex, and a hair found on defendant's underwear was found to be microscopically similar to the sample provided by the victim. *Bell v. State*, 371 Ark. 375, 266 S.W.3d 696 (2007).

Evidence was sufficient to convict defendant under 18 U.S.C.S. § 2422(b) of attempting to persuade a minor to engage in sexual activity for which defendant could have been charged with a criminal offense, which under § 5-14-127(a)(1) and subdivision (1)(A) of this section included oral sex (which constituted "deviate sexual activity") with a person under age 16; evidence was offered that defendant discussed sexual activity with a 15-year-old victim, and there was sufficient evidence to establish that defendant knew that the victim was under 16 given defendant's behavior indicating a consciousness of guilt, the victim's testimony, and the transcript of an online chat between defendant and a detective posing as the victim. *United States v. Langley*, 549 F.3d 726 (8th Cir. 2008).

Victim's testimony alone supported appellant's conviction for rape and sexual assault; moreover, the victim's testimony illustrated that there were several different actions of sexual assault and rape—acts that could each be separated in time as involving distinct impulses. *Bryant v. State*, 2010 Ark. 7, 377 S.W.3d 152 (2010).

Although appellant offered testimony that conflicted with the victim's testimony and the evidence presented at trial, the supreme court only needed to limit its review to those facts supporting the verdict to conclude that there was sufficient evidence to support the conviction of rape; the victim testified that she was forced to engage in deviate sexual activity with appellant and, after the attack, she ran from the house where she was eventually found by police. Although a semen sample collected during an examination did not match the DNA of appellant, but, rather that of the victim's fiancé, the victim's testimony need not be corroborated; furthermore, it was for the jury to decide whether the testimony was credible. *Hickey v. State*, 2010 Ark. 109, — S.W.3d — (2010).

Defendant's conviction for attempted rape of his 13-year-old stepdaughter was

supported by the evidence because the victim testified that defendant, who wanted oral sex from her, a deviate sexual activity under subdivision (1) of this section, thrust himself upon her while she was in the shower until her grandmother, who lived next door, appeared at the front door. *Forrest v. State*, 2010 Ark. App. 686, — S.W.3d — (2010).

Defendant's conviction for raping his seven-year-old daughter was proper because the victim's testimony that he "put his private part in her butt" was sufficient to sustain the conviction under § 5-14-103(a)(3)(A) and subdivision (1)(A) of this section; a nurse corroborated the victim's testimony in that the nurse found that the injuries to the victim's anus and hymen were consistent with penetration. *Harlmo v. State*, 2011 Ark. App. 314, 383 S.W.3d 447 (2011).

### **Evidence.**

Evidence was sufficient to sustain defendant's rape conviction because the child testified that defendant put his finger inside her body on what she described as her "private part," and to prove rape, the state was required to show that there was penetration, however slight, of the labia majora of the victim. *McLish v. State*, 2012 Ark. App. 275, — S.W.3d — (2012).

Substantial evidence supported defendant's conviction for rape in violation of § 5-14-103(a)(3)(A), because the child victim testified that when she was seven years old, defendant forced her onto the bed, touched her chest, and sexually penetrated her vagina under subdivision (1)(B) of this section. Therefore, the circuit court properly denied his motion for directed verdict. *Fields v. State*, 2012 Ark. 353, — S.W.3d — (2012).

Victim's testimony relating to her grade level and place of residency at the time of assaults was sufficient proof for a jury to determine when certain assaults occurred under subdivision (1)(B) of this section and § 5-14-103(a)(3)(A). *Mashburn v. State*, 2012 Ark. App. 621, — S.W.3d —, 2012 Ark. App. LEXIS 749 (Nov. 7, 2012).

### **Forcible Compulsion.**

Evidence was sufficient to convict defendant of rape where the victim, who had physical limitations, testified that defendant forced her to have sexual intercourse



and to perform sexual acts on him after he entered her home under the pretext of using the telephone. *Ellis v. State*, 364 Ark. 538, 222 S.W.3d 192 (2006).

Rape victim's testimony was more than sufficient to show that the sex acts were against her will, and, thus, substantial evidence existed to support the element of forcible compulsion under subdivision (a)(1) of this section. *Rounsaville v. State*, 2009 Ark. 479, 346 S.W.3d 289 (2009).

Where the victim testified that defendant drove her to an unfamiliar area, poured each of them a shot glass of liquor, and forced her to have sexual intercourse with him against her will, the victim's testimony was sufficient to support defendant's conviction for rape in violation of subdivision (a)(1) of this section. The element of "forcible compulsion," as set forth in subdivision (2), was established by the victim's testimony that she told defendant that she "didn't want to do it;" she pushed him off her; and she fought him as he removed her clothes, but defendant's strength was such that she was unable to keep him from removing her clothes. *Goodman v. State*, 2009 Ark. App. 262, 306 S.W.3d 443 (2009).

After their relationship had ended, the victim testified that defendant forced her into the bedroom, removed their clothing, and forced her to have sexual relations while she either attempted to leave or kicked and pushed him; defendant told a detective that he knew the victim did not want to have sex with him. The Court of Appeals of Arkansas held that the evidence was sufficient to support defendant's convictions for two counts of rape under § 5-14-103(a)(1); the state did prove the element of forcible compulsion for purposes of subdivision (2) of this section. *Henson v. State*, 2009 Ark. App. 464, 320 S.W.3d 19 (2009).

At the hearing to revoke defendant's suspended imposition of sentence (SIS), the victim testified that defendant expressed his desire to touch and caress her, pinned her down despite her protests, and inserted his finger in her vagina. Because the victim's testimony reached all of the elements of rape described in this section, the trial court did not err by revoking defendant's SIS. *Ray v. State*, 2009 Ark. App. 679, — S.W.3d — (2009).

Circuit court's decision to revoke probation on the ground that defendant had

committed rape under § 5-14-103(a)(1) was not clearly against the preponderance of the evidence because defendant's pointing of a firearm at the victim was evidence of an implied threat of death or physical injury, and thus was forcible compulsion, as defined in subdivision (2) of this section. *Craig v. State*, 2010 Ark. App. 309, — S.W.3d — (2010).

Because the only rulings adverse to defendant were the denials of defendant's motions for a directed verdict, and because the victim's testimony that defendant hit, choked, and raped the victim was supported by physical evidence, there was substantial evidence under subdivision (2) of this section and § 5-14-103 to support defendant's conviction. *Russell v. State*, 2011 Ark. App. 479, — S.W.3d — (2011).

### **Guardian.**

Where it was shown that defendant acted as a stepfather toward the 15-year-old daughter of his girlfriend, he stood in the position of a guardian since he spoke of the victim as his daughter and attended school functions as a parent. Therefore, there was sufficient evidence to support a conviction for rape under § 5-14-103(a)(4)(A)(i) based on his sexual intercourse with the child. *White v. State*, 370 Ark. 284, 259 S.W.3d 410 (2007).

Where the evidence showed that defendant assumed the role of a father figure by paying bills, taking children on outings, and taking the victim to the emergency room, the evidence was sufficient to show that he was a guardian under subdivision (3) of this section for purposes of a rape conviction under § 5-14-103(4)(a)(A)(i). *Thompson v. State*, 99 Ark. App. 422, 262 S.W.3d 193 (2007).

Evidence produced by the state at trial was sufficient for the jury to reasonably conclude that, by virtue of the living arrangement, appellant was placed in an apparent position of power or authority over the minor victim and that appellant was thus the victim's guardian for the purposes of subdivision (3) of this section and §§ 5-14-103(a)(4)(A)(i) and 5-14-125(a)(4)(A)(iii), thus the jury verdict was supported by substantial evidence. *Pack v. State*, 2010 Ark. App. 82, — S.W.3d — (2010).

### **Penetration.**

Evidence was sufficient to sustain defendant's rape conviction because the

child victim testified that defendant put his “bad spot” in her mouth and “peed” in her mouth. She described his “bad spot” as looking like an elephant trunk and his “pee” as looking like “chicken noodle soup without the noodles or the chicken.” *Lamb v. State*, 372 Ark. 277, 275 S.W.3d 144 (2008).

Defendant’s conviction for rape was supported by the evidence because the 84-year-old victim testified that she awoke to find a young, nude, black man standing over her and that the man raped her; although the victim did not testify specifically about the penetration that occurred, the circumstantial evidence, specifically the testimony from an emergency room physician, established the element of penetration, as defined in subdivision (10) of this section. *Young v. State*, 374 Ark. 350, 288 S.W.3d 221 (2008).

In a case in which defendant appealed his conviction for rape of a 20-year old woman with a mental defect or mental incapacity, he unsuccessfully argued that there was insufficient evidence that penetration occurred. In addition to the testimony, there was also circumstantial medical evidence admitted that constituted substantial evidence to support the conviction; testimony from a nurse describing the procedure for taking the medical samples from inside the anus and vagina, together with evidence from the forensic experts concerning the presence of defendant’s Y-chromosomal DNA on the victim’s rectal swab, clearly gave rise to more than a mere suspicion and left little room for doubt that penetration occurred. *Fernandez v. State*, 2010 Ark. 148, 362 S.W.3d 905 (2010).

Victim’s testimony was sufficient to convince the jury that there was penetration under subdivision (1)(B) of this section, as there was testimony from the victim’s parent and a social worker that the victim told them that defendant touched the victim’s “privates” under the victim’s panties, and the victim testified that defendant touched the victim with defendant’s fingers and knuckles and described the act of using them to separate the victim’s labia majora. *Montgomery v. State*, 2010 Ark. App. 501, — S.W.3d — (2010).

Because a 12-year old child victim’s uncorroborated testimony of penetration and vaginal and anal intercourse was sufficient to satisfy the statutory elements

for rape, and because any inconsistencies were for the jury to resolve, defendant was properly convicted of violating subdivision (1) of this section and § 5-14-103(a)(3)(A). *Hawkins v. State*, 2011 Ark. App. 164, — S.W.3d — (2011).

Defendant’s conviction for raping his daughter under § 5-14-103(a)(4)(A)(i) was appropriate because the evidence was sufficient. The minor victim’s testimony constituted substantial evidence that defendant had raped her and a doctor had testified that the daughter’s examination revealed findings consistent with penetration under subdivision (11) of this section. *Vance v. State*, 2011 Ark. 392, 384 S.W.3d 515 (2011).

Defendant’s confession that he had his penis out and touched his five-year-old niece’s mouth with it, and that she might have opened her mouth, coupled with the child’s statement to her mother within seconds or minutes of the incident that defendant had put his pee-pee in her mouth, was sufficient to convict defendant of rape. *Davis v. State*, 2011 Ark. App. 686, 386 S.W.3d 647 (2011).

Motion for a directed verdict as to one rape charge against appellant relating to penetration by a penis was insufficient to challenge the sufficiency of a conviction for rape by digital penetration under Ark. R. Crim. P. 33.1(c); even if the issue was preserved, a victim’s testimony was sufficient and substantial evidence to support a conviction. *Clayton v. State*, 2012 Ark. App. 199, — S.W.3d — (2012).

Victim’s oral cavity does not have to be fully entered in order for penetration to occur under subdivision (1)(A) of this section; rather, slight penetration, such as that of the lips, can be sufficient to constitute rape. Therefore, a directed verdict was properly denied because there was sufficient evidence of penetration under subdivision (1)(A) where the victim testified that appellant pushed her head down on his penis, which touched her lips; appellant was unable to push it further in the victim’s mouth because she had her teeth clenched. *Henderson v. State*, 2012 Ark. App. 485, — S.W.3d — (2012).

Suspended sentence was properly revoked because the evidence showed that appellant committed rape under § 5-14-103(a)(1); penetration was shown by the circumstantial evidence where the victim sustained wounds to her body, appellant



admitted to having intercourse, and debris was found inside of the victim's vagina. Moreover, appellant's semen was found on the victim's inner thigh. *Edwards v. State*, 2012 Ark. App. 551, — S.W.3d — (2012).

### **Physically Helpless.**

Defendant's conviction for rape was upheld where there was ample testimony that the 16-year-old victim was at times unconscious, inebriated, "out of it," unable to stand, unable to walk, and unable to sit on a couch without falling off; there was also testimony that she had consumed approximately 12 shots of alcohol in a 20-minute period and, hence, was "physically helpless," as defined by subdivision (6) of this section. *Marshall v. State*, 94 Ark. App. 34, 223 S.W.3d 74 (2006).

Substantial evidence existed to revoke defendant's suspended sentence for sale of cocaine based on a finding that he committed a new criminal offense because his sister-in-law testified defendant sexually assaulted her after she consumed alcohol and fell asleep; therefore, she was physically helpless for purposes of subdivision (7)(A) of this section. *Wilson v. State*, 2012 Ark. App. 566, — S.W.3d — (2012).

### **Sexual Contact.**

Trial court properly denied defendant's motion for a directed verdict during his trial for sexual assault of his daughter because the testimony of the victim that defendant "would rub my behind," and that he put his private part "in my behind," was substantial evidence of sexual contact under subdivision (9) of this section to support the guilty verdict. *Brown v. State*, 374 Ark. 341, 288 S.W.3d 226 (2008).

Where defendant advertised "erotic services" on the Internet, she met an undercover officer at a hotel, and stroked his penis during the course of performing a massage; the officer's testimony was sufficient to show sexual activity through sexual contact as defined by this section. Defendant was properly convicted of prostitution under § 5-70-102, and sentenced to non-reporting probation for six months. *Arrigo v. State*, 2009 Ark. App. 568, 337 S.W.3d 560 (2009).

Defendant's convictions for rape as a habitual offender were appropriate pursuant to § 5-14-103(a)(3)(A) and subdivision

(10) of this section because the uncorroborated testimony of a rape victim alone was sufficient to sustain a conviction and the victim's testimony was substantial evidence supporting defendant's convictions. The victim testified consistently and with sufficient detail that defendant raped her and therefore, substantial evidence supported the convictions. *Price v. State*, 2010 Ark. App. 111, 377 S.W.3d 324 (2010).

To support a second-degree sexual assault conviction, pursuant to § 5-14-125(a)(3), the state did not have to provide direct proof that the act was done for sexual gratification because it could be assumed that the desire for sexual gratification was a plausible reason for sexual contact, as defined by subdivision (10) of this section. *Ross v. State*, 2010 Ark. App. 129, — S.W.3d — (2010).

In a case in which defendant appealed his conviction for sexual assault in the second degree, in violation of § 5-14-125(a)(4)(A)(iii), he argued unsuccessfully that the trial court erred in denying his motion for a directed verdict. The victim's testimony alone was sufficient to support defendant's conviction, and the jury was not required to believe defendant's testimony that he had not touched the victim's breast. *Chavez v. State*, 2010 Ark. App. 161, — S.W.3d — (2010).

Evidence was sufficient to convict defendant of second-degree sexual assault under § 5-14-125(a)(3) because the child victim told a detective about a magic thumb game she played with defendant, pointed to the genitalia area of an anatomically correct doll when describing the magic thumb, and said that when it got big, she made it little again. *King v. State*, 2012 Ark. App. 253, — S.W.3d — (2012).

Revocation of probation was proper, because the appellate court was bound to defer to the trial court on issues of credibility, and the victim's testimony established each of the elements for committing second-degree sexual assault under subdivision (a)(1) of this section, when she indicated that the petitioner had her up against the wall and touched her buttocks and vagina. *Boykins v. State*, 2012 Ark. App. 263, — S.W.3d — (2012).

Trial court's delinquency adjudications finding that a juvenile committed three acts of sexual assault in the second degree, in violation of § 5-14-125(a)(1), were appropriate because the trial court found

that the testimony of each of the three victims as to the juvenile's making sexual contact with them, as defined by subsection (10) of this section, by inappropriately touching the victims in separate incidents was credible, and because the uncorroborated testimony of each of the victims of a sexual offense constituted sufficient evidence to support a finding of guilt. *D.D. v. State*, 2012 Ark. App. 637, — S.W.3d —, 2012 Ark. App. LEXIS 747 (Nov. 7, 2012).

### **Sexual Gratification.**

Defendant's conviction for the rape of a seven-year-old boy, in violation of § 5-14-103(a)(3)(A), was proper because there was substantial evidence upon which the jury could have inferred that defendant's actions were motivated by a desire for sexual gratification, as defined in subdivision (1)(B) of this section; the jury could have found sexual gratification even if the only evidence presented was that defendant put his finger in the victim's anus. *Rounsaville v. State*, 374 Ark. 356, 288 S.W.3d 213 (2008).

Where defendant admitted that he inappropriately touched an eleven-year-old girl while she was sleeping, the jury could infer that his actions were motivated by a desire for sexual gratification within the meaning of subdivision (9) of this section. The evidence was sufficient to support his conviction for sexual assault in the second degree in violation of § 5-14-125(a)(3); the trial court did not err by denying his motion for a directed verdict. *Davis v. State*, 2009 Ark. App. 753, 386 S.W.3d 647 (2009).

Conviction for sexual assault in the second degree for violating § 5-14-125(a)(3) was supported by sufficient evidence because it was at least plausible that defendant's act of touching the victim's vaginal area with his foot, after which he ordered her not to tell anyone and later wrote a letter of apology, was done for the purpose of sexual gratification, pursuant to subdivision (10) of this section. *Elliott v. State*, 2010 Ark. App. 185, — S.W.3d — (2010).

Credibility arguments relating to a conviction for second-degree sexual assault

were not preserved for appellate review because appellant presented different arguments at the trial court level; appellant argued that the charge was a lesser-included offense of rape and that the element of sexual gratification was not proven. Arguments not raised at trial were not addressed for the first time on appeal, and appellant was not able to change the grounds for his directed verdict motion on appeal. *Clayton v. State*, 2012 Ark. App. 199, — S.W.3d — (2012).

### **Sexual Intercourse.**

Evidence was sufficient to sustain a rape conviction because the victim gave unequivocal testimony that defendant engaged in acts of sexual intercourse, cunnilingus, or fellatio with her several times a week beginning when she was thirteen or fourteen years old. *Keck v. State*, 2009 Ark. App. 559, — S.W.3d — (2009).

Sufficient evidence supported defendant's conviction for rape, because the thirteen-year-old victim's testimony that defendant had sexual intercourse with her under subdivision (11) of this section while they were living in various houses satisfied the statutory elements of rape. *Christian v. State*, 2013 Ark. 86, — S.W.3d — (2013).

Defendant was convicted for one count of rape because he admitted to engaging in sexual relations with his biological daughter when she was 10-years-old and a sexual-assault nurse examiner discovered injuries to the victim that were indicative of sexual assault or trauma. Defendant's statement to police provided sufficient evidence that he engaged in "sexual intercourse" with a person less than fourteen years of age within the meaning of subdivision (11) of this section. *Breeden v. State*, 2013 Ark. 145, — S.W.3d — (2013).

**Cited:** *Ward v. State*, 370 Ark. 398, 260 S.W.3d 292 (2007); *Rouzer v. State*, 2009 Ark. App. 658, — S.W.3d — (2009); *Stidam v. State*, 2010 Ark. App. 278, 374 S.W.3d 246 (2010); *Estrada v. State*, 2011 Ark. 3, 376 S.W.3d 395 (2011).



**5-14-102. In general.****CASE NOTES****Affirmative Defenses.**

In a proceeding regarding placement on a child maltreatment registry, evidence that there was a mistake of age did not negate the finding of child maltreatment. *C.C.B. v. Arkansas HHS*, 368 Ark. 540, 247 S.W.3d 870 (2007).

Appellant's sexual assault conviction under § 5-14-127(a)(3) was affirmed where his argument that he reasonably believed that the victim was older than 16 was an affirmative defense under § 5-14-102(d)(1) and thus, the trial court properly concluded that he, rather than the State, bore the burden of proof under § 5-1-111(d)(1). *Wright v. State*, 98 Ark. App. 271, 254 S.W.3d 755 (2007).

Court rejected petitioner's contention

that the reasonable mistake of age defense in subsection (d) of this section violated the Due Process Clause by shifting the burden of proof on an essential element to the defendant; if the Arkansas statute employed a strict-liability standard concerning the victim's age, then the state retained the burden of proving all elements of the offense, and no further facts are either presumed or inferred in order to constitute the crime (the defendant's reasonable ignorance of the victim's age would therefore mitigate the offense, not rebut a presumed element). *Neely v. McDaniel*, 677 F.3d 346 (8th Cir. 2012), rehearing denied, — F.3d —, 2012 U.S. App. LEXIS 12159 (8th Cir. Ark. June 14, 2012).

**5-14-103. Rape.**

(a) A person commits rape if he or she engages in sexual intercourse or deviate sexual activity with another person:

(1) By forcible compulsion;

(2) Who is incapable of consent because he or she is:

(A) Physically helpless;

(B) Mentally defective; or

(C) Mentally incapacitated;

(3)(A) Who is less than fourteen (14) years of age.

(B) It is an affirmative defense to a prosecution under subdivision (a)(3)(A) of this section that the actor was not more than three (3) years older than the victim; or

(4)(A) Who is a minor and the actor is the victim's:

(i) Guardian;

(ii) Uncle, aunt, grandparent, step-grandparent, or grandparent by adoption;

(iii) Brother or sister of the whole or half blood or by adoption; or

(iv) Nephew, niece, or first cousin.

(B) It is an affirmative defense to a prosecution under subdivision (a)(4)(A) of this section that the actor was not more than three (3) years older than the victim.

(b) It is no defense to a prosecution under subdivisions (a)(3) or (4) of this section that the victim consented to the conduct.

(c)(1) Rape is a Class Y felony.

(2) Any person who pleads guilty or nolo contendere to or is found guilty of rape involving a victim who is less than fourteen (14) years of age shall be sentenced to a minimum term of imprisonment of twenty-five (25) years.

(d)(1) A court may issue a permanent no contact order when:

(A) A defendant pleads guilty or nolo contendere; or

(B) All of the defendant's appeals have been exhausted and the defendant remains convicted.

(2) If a judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the case, the judicial officer shall enter such orders as are consistent with § 5-2-305.

(e) A person convicted of rape is subject to § 9-10-121.

**History.** Acts 1975, No. 280, § 1803; 1981, No. 620, § 12; 1985, No. 281, § 2; 1985, No. 919, § 2; A.S.A. 1947, § 41-1803; Acts 1993, No. 935, § 1; 1997, No. 831, § 1; 2001, No. 299, § 1; 2001, No. 1738, § 1; 2003, No. 1469, § 3; 2006 (1st Ex. Sess.), No. 5, § 2; 2009, No. 748, § 8; 2013, No. 210, § 2.

**Amendments.** The 2009 amendment substituted "a minor" for "less than eighteen (18) years of age" in the introductory language of (a)(4)(A).

The 2013 amendment added (e).

## RESEARCH REFERENCES

**ALR.** Offense of Rape After Withdrawal of Consent. 33 A.L.R.6th 353.

**U. Ark. Little Rock L. Rev.** Annual

Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

## CASE NOTES

### ANALYSIS

In General.

Assistance of Counsel.

Directed Verdict.

Evidence.

—Admissibility.

—Sufficiency.

—Testimony of Minor Victims.

Force or Restraint.

Forcible Compulsion or Consent.

Indictment or Information.

Jurisdiction.

Lesser Included Offenses.

Penetration.

Physically Helpless.

Sentencing.

Separate Offenses.

Voir Dire.

### In General.

Defendant's conviction for the crime of rape for engaging in sexual intercourse or deviate sexual activity with a person who was less than fourteen years old was reversed because the trial court repeatedly allowed an investigator to vouch for the credibility of the nine-year-old victim. *Cox v. State*, 93 Ark. App. 419, 220 S.W.3d 231 (2005).

### Assistance of Counsel.

Appellee was convicted of the rape of a minor under subdivision (a)(4) of this section based on the victim's statements that appellee engaged in sexual intercourse with the victim when she was between four and seven years old; in the victim's recorded police statements, she asserted that her grandparents were asleep downstairs during the incident, despite the fact that her grandmother had died. In post-conviction proceedings, the circuit court did not err in granting appellee a new trial because trial counsel was ineffective in failing to use the victim's recorded statements to impeach her credibility. *State v. Estrada*, 2013 Ark. 89, — S.W.3d — (2013).

### Directed Verdict.

Sufficient evidence supported the denial of a directed verdict motion on defendant's rape charge, even though: (1) the victim had a prior felony conviction and had consumed multiple beers and cocaine on the night of the incident; (2) the victim willingly went to defendant's house and did not contact police because of outstanding warrants for her arrest; (3) there was no bruising on the victim; and that no hair



from defendant was found by the forensic serologist; (4) a third person could not be excluded from the vaginal swab; and (5) intercourse could not be conclusively shown between the victim and defendant from the swab. *Williams v. State*, 2011 Ark. App. 675, 386 S.W.3d 609 (2011).

### **Evidence.**

Where defendant was charged with the anal rape of a nine-year-old, the trial court erred, at a rape-shield hearing, in granting defendant's request to introduce evidence of the victim's allegations of sexual abuse against three others in order to show that the victim obtained sexual knowledge from a source other than defendant where the victim's descriptions of the prior abuse and the charged act were very dissimilar. *State v. Blandin*, 370 Ark. 23, 257 S.W.3d 68 (2007).

Where it was shown that defendant acted as a stepfather toward the 15-year-old daughter of his girlfriend, he stood in the position of a guardian since he spoke of the victim as his daughter and attended school functions as a parent. Therefore, there was sufficient evidence to support a conviction for rape under subdivision (a)(4)(A)(i) of this section based on his sexual intercourse with the child. *White v. State*, 370 Ark. 284, 259 S.W.3d 410 (2007).

Where a victim testified that defendant put something inside of her body after he touched her private area, and she saw him covering up his private area when she turned around, a motion for a directed verdict was properly denied since there was sufficient evidence to support a rape conviction under subdivision (a)(1)(C)(i) of this section. Other evidence supporting the conviction included a videotape of the victim's minor sister entering and exiting a shower, along with evidence of defendant's flight after being named a suspect. *Ward v. State*, 370 Ark. 398, 260 S.W.3d 292 (2007).

Evidence was sufficient to sustain defendant's rape conviction because defendant admitted that the six-year-old victim put her mouth on his penis and gave him oral sex, and a hair found on defendant's underwear was found to be microscopically similar to the sample provided by the victim. *Bell v. State*, 371 Ark. 375, 266 S.W.3d 696 (2007).

Where the evidence showed that defendant assumed the role of a father figure by

paying bills, taking children on outings, and taking the victim to the emergency room, the evidence was sufficient to show that he was a guardian under § 5-14-101(3) for purposes of a rape conviction under subdivision (4)(a)(A)(i) of this section. *Thompson v. State*, 99 Ark. App. 422, 262 S.W.3d 193 (2007).

Evidence was sufficient to sustain defendant's rape conviction because the child victim testified that defendant put his "bad spot" in her mouth and "peed" in her mouth. She described his "bad spot" as looking like an elephant trunk and his "pee" as looking like "chicken noodle soup without the noodles or the chicken." *Lamb v. State*, 372 Ark. 277, 275 S.W.3d 144 (2008).

Evidence was sufficient to sustain rape convictions because the victim's testimony that she was fifteen years of age at the time of the two charged rapes, that she grew up in defendant's home and considered him her father, and that defendant engaged in sexual intercourse with her was sufficient. Moreover, the victim's testimony was corroborated by other reliable evidence including a forensic DNA analyst's testimony that the semen found on the sock and the underwear matched the DNA sample provided by defendant, along with the nurse practitioner's testimony that the victim's injuries were consistent with sexual abuse. *Strong v. State*, 372 Ark. 404, 277 S.W.3d 159 (2008).

Where defendant was charged with raping his three-year-old daughter in violation of this section, the victim was incompetent to testify; the trial court did not violate defendant's Sixth Amendment confrontation rights by allowing the child's mother and social worker were permitted to testify as to the child's hearsay statements of abuse. The child's statements were nontestimonial. *Seely v. State*, 373 Ark. 141, 282 S.W.3d 778 (2008), cert. denied, *Seely v. State*, — U.S. —, 129 S. Ct. 218, 172 L. Ed. 2d 169 (2008).

In a child rape case, defendant's half-brother's testimony regarding possibly consensual oral sex that occurred 17 years previously should have been excluded under Ark. R. Evid. 404(b) as too dissimilar in character and temporally removed from the crimes charged, which involved repeated anal sex with a girl from ages four to eight. The pedophile exception did not apply. *Efird v. State*, 102 Ark. App. 110,

282 S.W.3d 282 (2008), review denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 571 (Sept. 4, 2008).

Trial court did not err in permitting the state to introduce videotapes depicting defendant engaged in sexual acts with his minor victims and with each other because the video footage was relevant to proving the elements of both the charges of rape and the charges of engaging children in the production of child pornography and because it could not be said that the video served no valid purpose other than to inflame the passions of the jury. *Williams v. State*, 374 Ark. 282, 287 S.W.3d 559 (2008), rehearing denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 589 (Oct. 30, 2008).

Where defendant was charged with numerous counts of rape and engaging children in the production of child pornography, the probative value of a DVD depicting defendant engaged in sexual contact with the young boys was not substantially outweighed by the danger of unfair prejudice because the state had the burden of proving the elements of all of the charges against defendant and because the state was entitled to prove the elements of the charges with its best evidence and the videos were certainly the state's best evidence. *Williams v. State*, 374 Ark. 282, 287 S.W.3d 559 (2008), rehearing denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 589 (Oct. 30, 2008).

Defendant's conviction for the rape of a seven-year-old boy, in violation of subdivision (a)(3)(A) of this section, was proper because there was substantial evidence upon which the jury could have inferred that defendant's actions were motivated by a desire for sexual gratification, as defined in § 5-14-101(1)(B); the jury could have found sexual gratification even if the only evidence presented was that defendant put his finger in the victim's anus. *Rounsaville v. State*, 374 Ark. 356, 288 S.W.3d 213 (2008).

Defendant's conviction for rape, in violation of subdivision (a)(1) of this section, was supported by the evidence because the 84-year-old victim testified that she awoke to find a young, nude, black man standing over her and that the man raped her; a forensic DNA analyst testified that a semen sample found on the victim's nightgown contained DNA that matched

the DNA of defendant. *Young v. State*, 374 Ark. 350, 288 S.W.3d 221 (2008).

Trial court did not err in denying defendant's motion for a directed verdict as there was sufficient evidence to support his conviction for the rape of a nine-year-old, in violation of subdivision (a)(3)(A) of this section; the victim's testimony constituted substantial evidence that defendant penetrated her vagina with his penis. *Kelley v. State*, 375 Ark. 483, 292 S.W.3d 297 (2009).

Rape victim's testimony was more than sufficient to show that the sex acts were against her will, and, thus, substantial evidence existed to support the element of forcible compulsion under subdivision (a)(1) of this section. *Rounsaville v. State*, 2009 Ark. 479, 346 S.W.3d 289 (2009).

Where the victim testified that defendant drove her to an unfamiliar area, poured each of them a shot glass of liquor, and forced her to have sexual intercourse with him against her will, the victim's testimony was sufficient to support defendant's conviction for rape in violation of subdivision (a)(1) of this section. *Goodman v. State*, 2009 Ark. App. 262, 306 S.W.3d 443 (2009).

Trial court did not err in denying defendant's motion for a directed verdict during his trial for the rape of his niece through marriage, in violation of subdivision (a)(4)(A)(ii) of this section, because the familial relationship extended to a relationship by affinity as well as a blood relationship; DNA testing confirmed that defendant was the biological father of the 15-year-old niece's child. *Wade v. State*, 2009 Ark. App. 346, 308 S.W.3d 178 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 674 (June 3, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 576 (Sept. 10, 2009).

On two separate occasions after their relationship had ended, the victim testified that defendant forced her into the bedroom, removed their clothing, and forced her to have sexual relations while she either attempted to leave or kicked and pushed him; defendant told a detective that he knew the victim did not want to have sex with him. The Court of Appeals of Arkansas held that the evidence was sufficient to support defendant's convictions for two counts of rape under subdivision (a)(1) of this section. *Henson v.*



State, 2009 Ark. App. 464, 320 S.W.3d 19 (2009).

Evidence was sufficient to sustain a rape conviction because the victim gave unequivocal testimony that defendant engaged in acts of sexual intercourse, cunnilingus, or fellatio with her several times a week beginning when she was thirteen or fourteen years old. *Keck v. State*, 2009 Ark. App. 559, — S.W.3d — (2009).

Defendant's eight-year-old daughter testified that he put cherry oil on her private parts and licked it off; she also testified that he put his private parts into her mouth. This testimony alone was sufficient to sustain defendant's conviction for rape in violation of subdivision (a)(3)(A) of this section. *Rouzer v. State*, 2009 Ark. App. 658, — S.W.3d — (2009).

At the hearing to revoke defendant's suspended imposition of sentence (SIS), the victim testified that defendant expressed his desire to touch and caress her, pinned her down despite her protests, and inserted his finger in her vagina. Because the victim's testimony reached all of the elements of rape under subsection (a) of this section, the trial court did not err by revoking defendant's SIS. *Ray v. State*, 2009 Ark. App. 679, — S.W.3d — (2009).

Evidence was sufficient to sustain defendant's conviction for rape where the victim's testimony, although uncorroborated, stated that defendant inserted his finger into her vagina, which clearly satisfied the statutory elements of rape under subdivision (a)(4)(A)(i) of this section. *Gilliland v. State*, 2010 Ark. 135, 361 S.W.3d 279 (2010).

Victim's testimony that defendant raped the victim, the testimony of the victim's mother positively identifying defendant as the perpetrator, and DNA evidence that conclusively linked defendant to the victim constituted sufficient evidence to support defendant's rape conviction under subdivision (a)(1) of this section. *Witcher v. State*, 2010 Ark. 197, 362 S.W.3d 321 (2010).

Defendant's convictions for rape as a habitual offender were appropriate pursuant to subdivision (a)(3)(A) of this section and § 5-14-101(10) because the uncorroborated testimony of a rape victim alone was sufficient to sustain a conviction and the victim's testimony was substantial evidence supporting defendant's convictions. The victim testified consistently and

with sufficient detail that defendant raped her and therefore, substantial evidence supported the convictions. *Price v. State*, 2010 Ark. App. 111, 377 S.W.3d 324 (2010).

Defendant's convictions for rape in violation of subdivision (a)(3)(A) of this section and sexual assault were appropriate because his sufficiency challenge was not preserved for review. In order to preserve a challenge to the sufficiency of the evidence, defendant was required to make a specific motion for a directed verdict that advised the trial court of the exact element of the crime that the state failed to prove; for that reason, his sufficiency challenge was not preserved. *Stidam v. State*, 2010 Ark. App. 278, 374 S.W.3d 246 (2010).

Sufficient evidence supported defendant's conviction for the rape of a person who was under the age of fourteen, a violation of subdivision (a)(3)(A) of this section, because the victim testified to at least two specific times when defendant had sex with her prior to her fourteenth birthday. The rape victim's testimony did not have to be corroborated, and scientific evidence was not required to support a rape conviction. *Moss v. State*, 2010 Ark. App. 395, — S.W.3d — (2010).

Defendant's conviction for rape of a minor grandchild in violation of this section was proper because the victim's testimony was sufficient to convince the jury that there was penetration to substantiate the charge of rape; the victim testified that the defendant touched the victim with defendant's fingers and knuckles and described the act of using them to separate the victim's labia majora. *Montgomery v. State*, 2010 Ark. App. 501, — S.W.3d — (2010).

Sufficient evidence supported defendant's rape conviction, under subdivision (a)(3)(A) of this section, because (1) the victim, who was less than 14 years old at the time, explicitly testified about two instances of sexual intercourse and at least three instances of deviate sexual activity with defendant, and (2) this testimony alone was sufficient to sustain a conviction. *Coleman v. State*, 2010 Ark. App. 597, — S.W.3d — (2010).

Defendant's conviction for attempted rape of his 13-year-old stepdaughter, in violation of subdivision (a)(3)(A) of this section and § 5-3-201(b), was supported

by the evidence because the victim testified that defendant, who wanted oral sex from her, thrust himself upon her while she was in the shower until her grandmother, who lived next door, appeared at the front door. *Forrest v. State*, 2010 Ark. App. 686, — S.W.3d — (2010).

Where a victim testified that the man who had intercourse with her on the night in question, who was identified by the forensic evidence as defendant, did so by forcible compulsion, the testimony of the victim was, by itself, substantial evidence to support a conviction on a charge of rape. *Walker v. State*, 2010 Ark. App. 688, — S.W.3d — (2010).

There was sufficient evidence for a jury to convict defendant of rape. The victim testified that defendant had sexual intercourse with her several times from the time she was four years old until she was seven years old, and the victim's testimony alone was sufficient evidence to prove rape without corroboration or forensic findings. *Estrada v. State*, 2011 Ark. 3, 376 S.W.3d 395 (2011).

Because a 12-year old child victim's uncorroborated testimony of penetration and vaginal and anal intercourse was sufficient to satisfy the statutory elements for rape, and because any inconsistencies were for the jury to resolve, defendant was properly convicted of violating § 5-14-101(1) and subdivision (a)(3)(A) of this section. *Hawkins v. State*, 2011 Ark. App. 164, — S.W.3d — (2011).

Defendant's conviction for raping his seven-year-old daughter was proper because the victim's testimony that he "put his private part in her butt" was sufficient to sustain the conviction under subdivision (a)(3)(A) of this section and § 5-14-101(1)(A); a nurse corroborated the victim's testimony in that the nurse found that the injuries to the victim's anus and hymen were consistent with penetration. *Harlmo v. State*, 2011 Ark. App. 314, 383 S.W.3d 447 (2011).

Defendant's conviction for raping his daughter under subdivision (a)(4)(A)(i) of this section was appropriate because the evidence was sufficient. The minor victim's testimony constituted substantial evidence that defendant had raped her and a doctor had testified that the daughter's examination revealed findings consistent with penetration under § 5-14-

101(11). *Vance v. State*, 2011 Ark. 392, 384 S.W.3d 515 (2011).

Thirteen-year old victim's uncorroborated testimony that the victim and defendant had sex was sufficient to sustain defendant's conviction for rape under subdivision (a)(3)(A) of this section. *Vance v. State*, 2011 Ark. App. 413, — S.W.3d — (2011).

Because the only rulings adverse to defendant were the denials of defendant's motions for a directed verdict, and because the victim's testimony that defendant hit, choked, and raped the victim was supported by physical evidence, there was substantial evidence under § 5-14-101(2) and this section to support defendant's conviction. *Russell v. State*, 2011 Ark. App. 479, — S.W.3d — (2011).

Motion for a directed verdict as to one rape charge against appellant relating to penetration by a penis was insufficient to challenge the sufficiency of a conviction for rape by digital penetration under Ark. R. Crim. P. 33.1(c); even if the issue was preserved, a victim's testimony was sufficient and substantial evidence to support a conviction. *Clayton v. State*, 2012 Ark. App. 199, — S.W.3d — (2012).

Evidence was sufficient to sustain defendant's rape conviction because the child testified that defendant put his finger inside her body on what she described as her "private part," and to prove rape, the state was required to show that there was penetration, however slight, of the labia majora of the victim. *McLish v. State*, 2012 Ark. App. 275, — S.W.3d — (2012).

At defendant's trial for rape under this section, the circuit court did not abuse its discretion in determining that evidence of his prior convictions for carnal abuse of a child, arson, terroristic threatening, and failure to register as a sex offender were admissible under Ark. R. Evid. 609 to impeach defendant. The prior convictions were highly probative of his credibility, which was at issue because he chose to testify at trial and claimed in defense that the victim offered to pay him to have sex with her. *Jordan v. State*, 2012 Ark. 277, — S.W.3d — (2012).

Substantial evidence supported defendant's conviction for rape under subdivision (a)(3)(A) of this section, because the child victim testified that when she was seven years old, defendant forced her onto



the bed, touched her chest, and sexually penetrated her. Therefore, the circuit court properly denied his motion for directed verdict. *Fields v. State*, 2012 Ark. 353, — S.W.3d — (2012).

At defendant's trial for rape under subdivision (a)(3)(A) of this section, the circuit court did not abuse its discretion in admitting testimony from three witnesses who had prior sexual contact with defendant pursuant to the pedophile exception to Ark. R. Evid. 404(b). Like the victim, the witnesses were young children at the time they had an intimate relationship with defendant. *Fields v. State*, 2012 Ark. 353, — S.W.3d — (2012).

In defendant's prosecution for rape of a physically helpless victim who was unable to consent, defendant's prior conviction of lewd molestation of a child was admissible under the pedophile exception to Ark. R. Evid. 404(b) as probative of defendant's motive, intent, and plan to assault the victim because, in each case, defendant placed himself in a position of authority, isolated the victim from parents or other adults while engaging the victim in a favored activity, removed the victim's pants, performed oral sex on the victim, and then told the victim not to tell and, in both cases, defendant cultivated a relationship close in acquaintance based on common interests and enjoyed a position of authority over the victims. The differences in age and gender between the two victims did not render the pedophile exception inapplicable; nor did the passage of 17 years between the events render the earlier event too remote to be admissible under Rule 404(b) because defendant's prior conviction, despite its age, tended to prove defendant's depraved sexual instinct. *Craig v. State*, 2012 Ark. 387, — S.W.3d — (2012).

Notwithstanding testimony that the alleged rape victim was a heavy drinker whose personality and memory changed when she was under the influence, the jury was entitled to believe the victim's testimony describing an assault and act of sexual intercourse by defendant that continued after she told him to quit, particularly where there was testimony by others that defendant admitted he had sexual intercourse with the victim and admitted he had raped her. The believability of the victim was a function for the jury as the fact-finder, not the reviewing court. *Har-*

*ris v. State*, 2012 Ark. App. 651, — S.W.3d —, 2012 Ark. App. LEXIS 765 (Nov. 14, 2012).

Victim's testimony relating to her grade level and place of residency at the time of assaults was sufficient proof for a jury to determine when certain assaults occurred under subdivision (a)(3)(A) of this section and § 5-14-101(1)(B). *Mashburn v. State*, 2012 Ark. App. 621, — S.W.3d —, 2012 Ark. App. LEXIS 749 (Nov. 7, 2012).

Sufficient evidence supported defendant's conviction for rape under subdivision (a)(3)(A) of this section, because the thirteen-year-old victim's testimony that defendant had sexual intercourse with her while they were living in various houses satisfied the statutory elements of rape. *Christian v. State*, 2013 Ark. 86, — S.W.3d — (2013).

Sufficient evidence supported defendant's conviction for one count of rape in violation of this section, because he admitted to engaging in sexual relations with his biological daughter when she was 10-years-old and a sexual-assault nurse examiner discovered injuries to the victim that were indicative of sexual assault or trauma. *Breedon v. State*, 2013 Ark. 145, — S.W.3d — (2013).

#### —Admissibility.

In defendant's trial for raping his step-granddaughter when she was six years old, the circuit court abused its discretion by granting defendant's motion to introduce evidence that his step-granddaughter was sexually assaulted by someone else when she was four years old; defendant's step-granddaughter's descriptions of the two incidents were substantially dissimilar and, because there was little evidence that the prior incident resembled the acts defendant allegedly committed, information about the prior incident was not relevant to the allegations against defendant. *State v. Townsend*, 366 Ark. 152, 233 S.W.3d 680 (2006).

#### —Sufficiency.

Evidence was sufficient to support defendant's conviction on three counts of rape of a 10-year old of a person who was less than 14 years of age where the victim testified that she was 10 years old at the time of the offenses and that defendant put his penis inside her vagina, anus, and mouth, and she gave a full accounting of

his actions on the evening in question; this testimony alone was substantial evidence to support defendant's convictions. *Parker v. State*, 93 Ark. App. 472, 220 S.W.3d 238 (2005).

There was sufficient evidence to convict defendant of rape where the victim gave detailed testimony regarding the sexual assaults; the jury was free to find the victim a more credible witness despite certain inaccuracies in her testimony. *Gillard v. State*, 366 Ark. 217, 234 S.W.3d 310 (2006).

Defendant's conviction for rape of his infant daughter was affirmed as the child showed signs of sexual abuse immediately after being left with defendant, and defendant's semen was found on the child's diaper. *Terry v. State*, 366 Ark. 441, 236 S.W.3d 495 (2006).

Evidence was sufficient to sustain an attempted rape conviction where defendant initiated a call to the 13 year old victim, picked her up under false pretenses, isolated her in a motel room, told her that he and his girlfriend intended to engage in sexual intercourse with her, and he returned to the motel room with his girlfriend; those steps went beyond mere planning and preparation. *Mitchem v. State*, 96 Ark. App. 78, 238 S.W.3d 623 (2006).

Evidence was sufficient to support defendant's rape convictions where both victims stated in their interviews that defendant had sexual intercourse with them, both victims were under the age of 14, and medical evidence substantiated the victims' testimony. *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006), rehearing denied, 367 Ark. 609, 242 S.W.3d 240 (2006), cert. denied, 550 U.S. 904, 127 S. Ct. 2114, 167 L. Ed. 2d 815 (2007).

Although appellant offered testimony that conflicted with the victim's testimony and the evidence presented at trial, the supreme court only needed to limit its review to those facts supporting the verdict to conclude that there was sufficient evidence to support the conviction of rape; the victim testified that she was forced to engage in deviate sexual activity with appellant and, after the attack, she ran from the house where she was eventually found by police. Although a semen sample collected during an examination did not match the DNA of appellant, but, rather that of the victim's fiancé, the victim's

testimony need not be corroborated; furthermore, it was for the jury to decide whether the testimony was credible. *Hickey v. State*, 2010 Ark. 109, — S.W.3d — (2010).

Evidence produced by the state at trial was sufficient for the jury to reasonably conclude that, by virtue of the living arrangement, appellant was placed in an apparent position of power or authority over the minor victim and that appellant was thus the victim's guardian for the purposes of subdivision (a)(4)(A)(i) of this section and §§ 5-14-125(a)(4)(A)(iii) and 5-14-101(3), thus the jury verdict was supported by substantial evidence. *Pack v. State*, 2010 Ark. App. 82, — S.W.3d — (2010).

#### —Testimony of Minor Victims.

Victim's testimony alone supported appellant's conviction for rape and sexual assault; moreover, the victim's testimony illustrated that there were several different actions of sexual assault and rape—acts that could each be separated in time as involving distinct impulses. *Bryant v. State*, 2010 Ark. 7, 377 S.W.3d 152 (2010).

#### Force or Restraint.

In a case alleging rape, kidnapping, and third-degree domestic battery, a sufficiency of the evidence argument was not preserved for review because defendant argued on the first time on appeal that the amount of restraint or force used did not warrant a kidnapping conviction and a third-degree battery conviction in addition to the rape. This was not the same argument raised during a directed verdict motion. *Rounsaville v. State*, 372 Ark. 252, 273 S.W.3d 486 (2008).

#### Forcible Compulsion or Consent.

Evidence was sufficient to convict defendant of rape where the victim, who had physical limitations, testified that defendant forced her to have sexual intercourse and to perform sexual acts on him after he entered her home under the pretext of using the telephone. *Ellis v. State*, 364 Ark. 538, 222 S.W.3d 192 (2006).

Circuit court's decision to revoke probation on the ground that defendant had committed rape under subdivision (a)(1) of this section was not clearly against the preponderance of the evidence because defendant's pointing of a firearm at the victim was evidence of an implied threat



of death or physical injury, and thus was forcible compulsion, pursuant to § 5-14-101(2). *Craig v. State*, 2010 Ark. App. 309, — S.W.3d — (2010).

### **Indictment or Information.**

Defendant was not entitled to a bill of particulars, pursuant to § 16-85-301(a); a bill of particulars as to the precise time offenses were committed was not necessary because time was not material to allegations of rape, under this section, and sexual assault in the second degree, under § 5-14-125. *Wallis v. State*, 2010 Ark. App. 238, 374 S.W.3d 737 (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 259 (May 6, 2010).

In a rape prosecution under subdivision (a)(3)(A) of this section, defendant's claim that the state did not prove sexual contact occurred on the date in the information failed because (1) the claim was unreserved, as defendant did not contest the information before trial, and (2) a failure to specify the exact date and time of a crime was not fatal unless time was an essential element, and time was not an essential element of rape. *Coleman v. State*, 2010 Ark. App. 597, — S.W.3d — (2010).

Denial of a continuance to a defendant did not violate due process; although the information was amended the day before trial from a charge of rape of someone less than 14 years old by forcible compulsion to rape by forcible compulsion in violation of subdivision (a)(1) of this section, the nature of the crime charged did not change, pursuant to § 16-85-407(b). *Green v. State*, 2012 Ark. 19, 386 S.W.3d 413 (2012).

### **Jurisdiction.**

Inmate's appeal from the denial of his petition for a writ of habeas corpus was dismissed as the inmate could not state grounds on which to maintain his petition; appellate court rejected inmate's claim that the trial court did not have jurisdiction to charge him for the underlying conviction of rape of a person less than fourteen years old because inmate was charged within five years of the victim's 18th birthday and, therefore, was within the statute of limitations set forth in § 5-1-109(b)(1) and (h). *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006).

### **Lesser Included Offenses.**

Trial court did not err during defendant's trial in refusing to instruct a jury on the lesser offense of sexual assault in the second degree, in violation of § 5-14-125(a)(3)(A)-(B), on one count of rape, in violation of subdivision (a)(3)(A) of this section, because sexual assault was not established by proof of the same or less than all of the elements required to establish rape, as required by § 5-1-110(b) to be a lesser-included offense. *Joyner v. State*, 2009 Ark. 168, 303 S.W.3d 54 (2009), cert. denied, *Joyner v. Arkansas*, 558 U.S. 1047, 130 S. Ct. 736, 175 L. Ed. 2d 514 (2009).

In a criminal trial, the circuit court did not abuse its discretion in denying defendant's request to instruct the jury that second-degree sexual assault under § 5-14-125(a)(3) was a lesser offense included in rape of a person less than fourteen years of age, as defined in subdivision (a)(3)(A) of this section, because the offense contained two elements not included in rape: defendant's age and marital status. Therefore, second-degree sexual assault was not a lesser offense included in rape. *Webb v. State*, 2012 Ark. 64, — S.W.3d — (2012).

### **Penetration.**

Defendant's conviction for rape was upheld where the 16-year-old victim's testimony about her physical symptoms, when coupled with the testimony of the other witnesses, provided circumstantial evidence of penetration, which was an element of both rape by sexual intercourse and rape by deviate sexual activity. *Marshall v. State*, 94 Ark. App. 34, 223 S.W.3d 74 (2006).

In a case in which defendant appealed his conviction for rape of a 20-year old woman with a mental defect or mental incapacity, he unsuccessfully argued that there was insufficient evidence that penetration occurred. In addition to the testimony, there was also circumstantial medical evidence admitted that constituted substantial evidence to support the conviction; testimony from a nurse describing the procedure for taking the medical samples from inside the anus and vagina, together with evidence from the forensic experts concerning the presence of defendant's Y-chromosomal DNA on the victim's rectal swab, clearly gave rise to more than a mere suspicion and left little room for

doubt that penetration occurred. *Fernandez v. State*, 2010 Ark. 148, 362 S.W.3d 905 (2010).

In defendant's prosecution under subdivision (a)(3)(A) of this section, evidence of penetration was sufficient because testimony of the victim's brother, the victim, a forensic examiner, and an expert sexual-assault nurse-examiner supported the jury's finding of penetration. *Elliott v. State*, 2010 Ark. App. 810, 379 S.W.3d 101 (2010).

Defendant's confession that he had his penis out and touched his five-year-old niece's mouth with it, and that she might have opened her mouth, coupled with the child's statement to her mother within seconds or minutes of the incident that defendant had put his pee-pee in her mouth, was sufficient to convict defendant of rape. *Davis v. State*, 2011 Ark. App. 686, 386 S.W.3d 647 (2011).

Victim's oral cavity does not have to be fully entered in order for penetration to occur under § 5-14-101(1)(A); rather, slight penetration, such as that of the lips, can be sufficient to constitute rape. Therefore, a directed verdict was properly denied because there was sufficient evidence of penetration under § 5-14-101(1)(A) where the victim testified that appellant pushed her head down on his penis, which touched her lips; appellant was unable to push it further in the victim's mouth because she had her teeth clenched. *Henderson v. State*, 2012 Ark. App. 485, — S.W.3d — (2012).

Suspended sentence was properly revoked because the evidence showed that appellant committed rape under subdivision (a)(1) of this section; penetration was shown by the circumstantial evidence where the victim sustained wounds to her body, appellant admitted to having intercourse, and debris was found inside of the victim's vagina. Moreover, appellant's semen was found on the victim's inner thigh. *Edwards v. State*, 2012 Ark. App. 551, — S.W.3d — (2012).

### **Physically Helpless.**

Allowing an alleged rape victim's prior sexual conduct into evidence was improper because defendant was charged with raping the victim while she was physically helpless and pursuant to subdivision (a)(2)(A) of this section, a person who was physically helpless at the time of

the rape was incapable of consent. Therefore, any prior sexual encounters between defendant and the victim, which might have been relevant if consent was a defense, were irrelevant where the victim could not have consented due to being physically helpless. *State v. Parker*, 2010 Ark. 173, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 315 (May 27, 2010).

### **Sentencing.**

Trial court did not abuse its discretion in denying defendant's motion to reduce his life sentence for the rape of his minor daughter as numerous witnesses testified to the alleged abuse of the victim, including the victim herself, and a nurse examiner testified to signs of extensive and ongoing sexual abuse; based on this evidence, the jury's verdict did not appear to be the result of passion or prejudice. *McDonald v. State*, 364 Ark. 491, 221 S.W.3d 349 (2006).

Where defendant pled guilty to rape and elected to be sentenced by a jury in a bifurcated proceeding, the trial court erred in admitting a videotaped statement of the child rape victim during the sentencing proceeding, because this violated defendant's right of confrontation under U.S. Const. Amend. VI and Ark. Const. Art. II, § 10. *Vankirk v. State*, 2011 Ark. 428, 385 S.W.3d 144 (2011).

### **Separate Offenses.**

Defendant's acquittal of charges under 18 U.S.C.S. § 2423(a) in federal court did not operate as a bar to his statutory rape prosecution in state court as the underlying conduct upon which the federal conviction and Arkansas charge were based was not the same; a state jury's verdict that an act of statutory rape occurred in Arkansas would not necessarily be consistent with a federal jury's finding that, at the point in time when defendant transported the minor across state lines, he did not intend for the minor to engage in sexual activity. *Winkle v. State*, 366 Ark. 318, 235 S.W.3d 482 (2006).

### **Voir Dire.**

In a rape prosecution under subdivision (a)(3)(A) of this section, it was not an abuse of discretion to overrule defendant's objection to the state's voir dire questions asking if jurors would require DNA evidence to convict a person of rape because



(1) the prosecutor posed the question to discern if any jurors would require scientific evidence for a rape conviction, which was a legitimate purpose of voir dire, and (2) defendant could not show prejudice, as

defendant did not seek a mistrial or admonition at trial. *Coleman v. State*, 2010 Ark. App. 597, — S.W.3d — (2010).

**Cited:** *Rye v. State*, 2009 Ark. App. 839, 373 S.W.3d 354 (2009).

### **5-14-110. Sexual indecency with a child.**

(a) A person commits sexual indecency with a child if:

(1) Being eighteen (18) years of age or older, the person solicits another person who is less than fifteen (15) years of age or who is represented to be less than fifteen (15) years of age to engage in:

(A) Sexual intercourse;

(B) Deviate sexual activity; or

(C) Sexual contact;

(2)(A) With the purpose to arouse or gratify a sexual desire of himself or herself or a sexual desire of any other person, the person purposely exposes his or her sex organs to another person who is less than fifteen (15) years of age.

(B) It is an affirmative defense to a prosecution under subdivision (a)(2)(A) of this section if the person is within three (3) years of age of the victim; or

(3) With the purpose to arouse or gratify a sexual desire of himself or herself or a sexual desire of any other person, the person purposely exposes his or her sex organs to a minor, and the actor is:

(A) Employed with the Department of Correction, Department of Community Correction, any city or county jail, or any juvenile detention facility, and the minor is in custody at a facility operated by the agency or contractor employing the actor;

(B) A mandated reporter under § 12-18-402(b) and is in a position of trust or authority over the minor; or

(C) The minor's guardian, an employee in the minor's school or school district, a temporary caretaker, or a person in a position of trust and authority over the minor;

(4) With the purpose to arouse or gratify his or her sexual desire or a sexual desire of another person, a person who is eighteen (18) years of age or older causes or coerces a minor to expose his or her sex organs to another person, and the actor is:

(A) Employed with the Department of Correction, the Department of Community Correction, any city or county jail, or any juvenile detention facility, and the minor is in custody at a facility operated by the agency or contractor employing the actor;

(B) A mandated reporter under § 12-18-402(b) and is in a position of trust or authority over the minor; or

(C) The minor's guardian, an employee in the minor's school or school district, a temporary caretaker, or a person in a position of trust or authority over the minor; or

(5) Being eighteen (18) years of age or older, the person causes or coerces another person who is less than fourteen (14) years of age to

expose his or her sex organs or the breast of a female with the purpose to arouse or gratify a sexual desire of himself, herself, or another person.

(b) Sexual indecency with a child is a Class D felony.

**History.** Acts 1975, No. 280, § 1810; A.S.A. 1947, § 41-1810; Acts 1995, No. 550, § 1; 2001, No. 1821, § 1; 2005, No. 1993, § 1; 2007, No. 531, § 1; 2009, No. 748, § 9; 2009, No. 758, § 1.

**A.C.R.C. Notes.** Acts 2009, No. 758, § 29, provided:

“Contingent Effectiveness. This act shall not become effective unless an act of the Eighty-Seventh General Assembly repealing the Arkansas Child Maltreatment Act, § 12-12-501 et seq., and enacting a new Child Maltreatment Act, § 12-18-101 et seq., becomes effective.” The contin-

gency in Acts 2009, No. 758, § 29, was met by Acts 2009, No. 749.

**Amendments.** The 2009 amendment by No. 748 substituted “a minor” for “another person who is less than eighteen (18) years of age” in (a)(3) and the present introductory language of (a)(4), redesignated (a)(4), and made related and minor stylistic changes.

The 2009 amendment by No. 758 substituted “mandated reporter under § 12-18-402(b)” for “professional under § 12-12-507(b)” in (a)(3)(B) and present (a)(4)(B).

## CASE NOTES

### ANALYSIS

Construction.  
Evidence.

#### Construction.

“Solicits” has an ordinary and usually accepted meaning in common language that can be drawn from dictionaries, and men may conduct themselves so as to avoid that which is forbidden; the statute is not impermissibly vague in all of its applications. *Neely v. McDaniel*, 677 F.3d 346 (8th Cir. 2012), rehearing denied, — F.3d —, 2012 U.S. App. LEXIS 12159 (8th Cir. Ark. June 14, 2012).

By criminalizing the solicitation of minors to engage in sexual activity, this section targets primarily, if not exclusively, illicit activity within the state’s power to regulate; the court rejected petitioner’s overbreadth challenge and concluded that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied. *Neely v. McDaniel*, 677 F.3d 346 (8th Cir. 2012), rehearing denied, — F.3d —, 2012 U.S. App. LEXIS 12159 (8th Cir. Ark. June 14, 2012).

Court rejected petitioner’s contention that the reasonable mistake of age defense in § 5-14-102(d) violated the Due Process Clause by shifting the burden of proof on an essential element to the defen-

dant; if the Arkansas statute employed a strict-liability standard concerning the victim’s age, then the state retained the burden of proving all elements of the offense, and no further facts are either presumed or inferred in order to constitute the crime (the defendant’s reasonable ignorance of the victim’s age would therefore mitigate the offense, not rebut a presumed element). *Neely v. McDaniel*, 677 F.3d 346 (8th Cir. 2012), rehearing denied, — F.3d —, 2012 U.S. App. LEXIS 12159 (8th Cir. Ark. June 14, 2012).

This section prohibits the solicitation of conduct that is already criminal under Arkansas law, and offers to engage in illegal transactions enjoy no First Amendment protection. *Neely v. McDaniel*, 677 F.3d 346 (8th Cir. 2012), rehearing denied, — F.3d —, 2012 U.S. App. LEXIS 12159 (8th Cir. Ark. June 14, 2012).

#### Evidence.

Evidence defendant initiated the first episode of sexual intercourse and provided transportation to his home and other locations so intercourse could take place supported a finding defendant solicited the victim and supported defendant’s conviction for sexual indecency with a child. *Halliday v. State*, 2011 Ark. App. 544, 386 S.W.3d 51 (2011).

Because an eight-year-old child victim’s testimony was enough to support a conviction, there was sufficient evidence to sup-



port defendant's convictions for sexual indecency with a child and second-degree sexual assault under subdivision (a)(2)(A)

of this section and § 5-14-125(a)(3), respectively. *Newton v. State*, 2012 Ark. App. 91, — S.W.3d — (2012).

**5-14-111. Public sexual indecency.**

**CASE NOTES**

**ANALYSIS**

Burden of Proof.

Construction With Other Law.

**Burden of Proof.**

Appellant's sexual assault conviction under § 5-14-127(a)(3) was affirmed where his argument that he reasonably believed that the victim was older than 16 was an affirmative defense under § 5-14-102(d)(1) and thus, the trial court properly concluded that he, rather than the State, bore the burden of proof under § 5-1-111(d)(1). *Wright v. State*, 98 Ark. App. 271, 254 S.W.3d 755 (2007).

**Construction With Other Law.**

Sentencing court had authority to order the registration of a defendant as a sexual offender because the defendant's crime of public sexual indecency was classified as a sexual offense, under this section, and because § 12-12-903(12)(B)(ii) did not restrict the sentencing court's authority to order registration for a person's conviction as a sex offender for a sexual offense neither enumerated in § 12-12-903(12)(A)(i) nor included under the provisions of § 12-12-903(12)(B)(ii). *Fountain v. State*, 103 Ark. App. 15, 285 S.W.3d 706 (2008).

**5-14-112. Indecent exposure.**

(a) A person commits indecent exposure if, with the purpose to arouse or gratify a sexual desire of himself or herself or of any other person, the person exposes his or her sex organs:

- (1) In a public place or in public view; or
- (2) Under circumstances in which the person knows the conduct is likely to cause affront or alarm.

(b)(1) Except as provided in subdivisions (b)(2) and (b)(3) of this section, indecent exposure is a Class A misdemeanor.

(2) For a fourth or fifth conviction within ten (10) years of a previous conviction, indecent exposure is a Class D felony.

(3) For a sixth conviction and each successive conviction within ten (10) years of a previous conviction, indecent exposure is a Class C felony.

(c) A woman is not in violation of this section for breastfeeding a child in a public place or any place where other individuals are present.

**History.** Acts 1975, No. 280, § 1812; A.S.A. 1947, § 41-1812; Acts 1997, No. 817, § 1; 2001, No. 1553, § 7; 2001, No. 1665, § 1; 2001, No. 1821, § 2; 2003, No.

862, § 1; 2005, No. 1815, § 1; 2005, No. 1962, § 5; 2007, No. 38, § 1; 2007, No. 680, § 1.

**RESEARCH REFERENCES**

**ALR.** Validity of State and Municipal Indecent Exposure Statutes and Ordinances. 71 A.L.R.6th 283.

### 5-14-122. Bestiality.

(a) As used in this section, “animal” means any dead or alive nonhuman vertebrate.

(b) A person commits bestiality if he or she performs or submits to any act of sexual gratification with an animal involving his or her or the animal’s sex organs and the mouth, anus, penis, or vagina of the other.

(c) Bestiality is a Class A misdemeanor.

**History.** Acts 1977, No. 828, § 1; A.S.A. 1947, § 41-1813; Acts 2005, No. 1994, § 496; 2007, No. 827, § 30.

### RESEARCH REFERENCES

**Ark. L. Notes.** Sheppard, Arkansas 1, Arkansas Law, 2003 Arkansas L. Notes Texas 0: Sodomy Law Reform and the 87.

### 5-14-123. Exposing another person to human immunodeficiency virus.

#### CASE NOTES

##### ANALYSIS

Evidence.  
Severance.  
Subpoena.

##### **Evidence.**

Where the evidence showed that defendant had vaginal sexual intercourse with a child, and he had been diagnosed with the Human Immuno-Deficiency Virus, there was sufficient evidence to support his conviction under this section. *White v. State*, 370 Ark. 284, 259 S.W.3d 410 (2007).

##### **Severance.**

Trial court was not required to sever a charge for exposure to the Human Im-

muno-Deficiency Virus (HIV) under Ark. R. Crim. P. 22.2 because the exposure to HIV was committed as part of a single scheme with a sexual assault in the fourth degree. It was discretionary whether or not to sever under Rule 22.2(b)(i). *White v. State*, 370 Ark. 284, 259 S.W.3d 410 (2007).

##### **Subpoena.**

Health Insurance Portability and Accountability Act of 1996 does not limit a state’s authority to investigate crimes; therefore, there was no error committed by the prosecution’s decision to subpoena a nurse practitioner to testify that defendant had tested positive for the Human Immuno-Deficiency Virus. *White v. State*, 370 Ark. 284, 259 S.W.3d 410 (2007).

### 5-14-124. Sexual assault in the first degree.

(a) A person commits sexual assault in the first degree if:

(1) The person engages in sexual intercourse or deviate sexual activity with a minor who is not the actor’s spouse and the actor is:

(A) Employed with the Department of Correction, the Department of Community Correction, the Department of Human Services, or any city or county jail or a juvenile detention facility, and the victim is in the custody of the Department of Correction, the Department of Community Correction, the Department of Human Services, any city



or county jail or juvenile detention facility, or their contractors or agents;

(B) A mandated reporter under § 12-18-402(b) and is in a position of trust or authority over the victim and uses the position of trust or authority to engage in sexual intercourse or deviate sexual activity; or

(C) An employee in the victim's school or school district, a temporary caretaker, or a person in a position of trust or authority over the victim; or

(2) The person is a teacher, principal, athletic coach, or counselor in a public or private school in kindergarten through grade twelve (K-12) and the actor:

(A) Engages in sexual intercourse or deviate sexual activity with a person who is not the actor's spouse and the victim is:

(i) Less than twenty-one (21) years of age; and

(ii) A student enrolled in the public or private school employing the actor; and

(B) Is in a position of trust or authority over the victim and uses his or her position of trust or authority over the victim to engage in sexual intercourse or deviate sexual activity.

(b) It is no defense to a prosecution under this section that the victim consented to the conduct.

(c) It is an affirmative defense to a prosecution under subdivision (a)(3) of this section that the actor was not more than three (3) years older than the victim.

(d) Sexual assault in the first degree is a Class A felony.

**History.** Acts 2001, No. 1738, § 2; 2003, No. 1391, § 1; 2003, No. 1469, § 2; 2009, No. 748, § 10; 2009, No. 758, § 2; 2013, No. 1044, § 1.

**A.C.R.C. Notes.** Acts 2009, No. 758, § 29, provided:

"Contingent Effectiveness. This act shall not become effective unless an act of the Eighty-Seventh General Assembly repealing the Arkansas Child Maltreatment Act, § 12-12-501 et seq., and enacting a new Child Maltreatment Act, § 12-18-101 et seq., becomes effective." The contingency in Acts 2009, No. 758, § 29, was met

by Acts 2009, No. 749.

**Amendments.** The 2009 amendment by No. 748 substituted "a minor" for "another person who is less than eighteen (18) years of age" in (a).

The 2009 amendment by No. 758 deleted "Health and" following "Department of" in two places in (a)(1), and substituted "mandated reporter under §12-18-402(b)" for "professional under §12-12-507(b)" in (a)(2).

The 2013 amendment added (a)(2) and redesignated (a)(1) accordingly.

## CASE NOTES

### ANALYSIS

Evidence.

Illustrative Cases.

### Evidence.

Evidence that a victim, who was a 14-year-old student of defendant, touched de-

fendant on her breast was admissible in defendant's trial for first-degree sexual assault under this section because it was independently relevant and fell within the pedophile exception to Ark. R. Evid. 404(b); the incidents corroborated the victim's testimony and established that defendant had a proclivity to engage in

sexual acts with minors with whom she had an intimate relationship. *Bobo v. State*, 102 Ark. App. 329, 285 S.W.3d 270 (2008), rehearing denied, — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 533 (June 25, 2008), review denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 595 (Oct. 30, 2008).

Defendant was a close friend of the victim's family and the victim was frequently allowed to spend the night in defendant's home while visiting defendant's son; the evidence of defendant's close friendship with the victim's parents, and of their frequent entrustment of the victim to defendant's care and supervision, was sufficient to support the finding that defendant was a temporary caretaker or in a position of trust over the victim. *Rasmussen v. State*, 2009 Ark. App. 586, — S.W.3d — (2009).

Finding that defendant held a position of trust or authority over the victim was supported by evidence that defendant picked the victim up and took the victim home from horse training and by testimony of the victim's father that defendant was helping the victim with riding and learning about rodeo and that the father trusted defendant as the adult watching

his daughter. *Halliday v. State*, 2011 Ark. App. 544, 386 S.W.3d 51 (2011).

### **Illustrative Cases.**

Defendant's conviction for first-degree sexual assault against a minor female was supported by sufficient evidence where defendant had a longstanding relationship with the minor as her instructor and with her parents, who trusted him to oversee her tae kwon do instruction and competitions, and her transportation home; a family friend to whom a minor is entrusted is in a position of authority or trust over that minor during the time of entrustment, and defendant's relationship could be characterized, at a minimum, to be that of a chaperone, which met the statutory threshold. *May v. State*, 94 Ark. App. 202, 228 S.W.3d 517 (2006).

In a case in which defendant was convicted of four counts of sexual assault of a minor, defendant fulfilled the role of temporary caretaker or person in a position of trust or authority under both this section and § 5-14-125, as defendant was in a position to care for the victim while the victim was staying overnight in defendant's home. *Nelson v. State*, 2011 Ark. 429, 384 S.W.3d 534 (2011).

**Cited:** *State v. Hayes*, 366 Ark. 199, 234 S.W.3d 307 (2006).

## **5-14-125. Sexual assault in the second degree.**

(a) A person commits sexual assault in the second degree if the person:

(1) Engages in sexual contact with another person by forcible compulsion;

(2) Engages in sexual contact with another person who is incapable of consent because he or she is:

(A) Physically helpless;

(B) Mentally defective; or

(C) Mentally incapacitated;

(3) Being eighteen (18) years of age or older, engages in sexual contact with another person who is:

(A) Less than fourteen (14) years of age; and

(B) Not the person's spouse;

(4)(A) Engages in sexual contact with a minor and the actor is:

(i) Employed with the Department of Correction, Department of Community Correction, any city or county jail, or any juvenile detention facility, and the minor is in custody at a facility operated by the agency or contractor employing the actor;

(ii) A mandated reporter under § 12-18-402(b) and is in a position of trust or authority over the minor; or



(iii) The minor's guardian, an employee in the minor's school or school district, a temporary caretaker, or a person in a position of trust or authority over the minor.

(B) For purposes of subdivision (a)(4)(A) of this section, consent of the minor is not a defense to a prosecution;

(5)(A) Being a minor, engages in sexual contact with another person who is:

- (i) Less than fourteen (14) years of age; and
- (ii) Not the person's spouse.

(B) It is an affirmative defense to a prosecution under this subdivision (a)(5) that the actor was not more than:

(i) Three (3) years older than the victim if the victim is less than twelve (12) years of age; or

(ii) Four (4) years older than the victim if the victim is twelve (12) years of age or older; or

(6) Is a teacher, principal, athletic coach, or counselor in a public or private school in a grade kindergarten through twelve (K-12), in a position of trust or authority, and uses his or her position of trust or authority over the victim to engage in sexual contact with a victim who is:

- (A) A student enrolled in the public or private school; and
- (B) Less than twenty-one (21) years of age.

(b)(1) Sexual assault in the second degree is a Class B felony.

(2) Sexual assault in the second degree is a Class D felony if committed by a minor with another person who is:

- (A) Less than fourteen (14) years of age; and
- (B) Not the person's spouse.

**History.** Acts 2001, No. 1738, § 3; 2003, No. 1323, § 1; 2003, No. 1720, § 2; 2009, No. 748, §§ 11–13; 2009, No. 758, § 3; 2011, No. 1129, § 1; 2013, No. 1086, § 2.

Acts 2009, No. 758, § 29, provided:

“Contingent Effectiveness. This act shall not become effective unless an act of the Eighty-Seventh General Assembly repealing the Arkansas Child Maltreatment Act, § 12-12-501 et seq., and enacting a new Child Maltreatment Act, § 12-18-101 et seq., becomes effective.” The contingency in Acts 2009, No. 758, § 29, was met by Acts 2009, No. 749.

**Amendments.** The 2009 amendment by No. 748 substituted “a minor” for “another person who is less than eighteen (18) years of age” in (a)(4)(A), (a)(5)(A), and (b)(2).

The 2009 amendment by No. 758 substituted “mandated reporter under §12-18-402(b)” for “professional under §12-12-507(b)” in (a)(4)(A)(ii).

The 2011 amendment inserted “principal, athletic coach, or counselor” in (a)(6).

The 2013 amendment rewrote the introductory language in (6), and inserted “or private” following “public” in (6)(A).

## CASE NOTES

### ANALYSIS

Constitutionality.  
Applicability.  
Appellate Review.

Evidence.  
Ineffective Assistance.  
Lesser Included Offense.

**Constitutionality.**

Subdivision (a)(6) of this section, as applied to a high school teacher who engaged in a consensual sexual relationship with an 18-year-old student, who was an adult under § 9-25-101(a), infringed on the teacher's fundamental right to privacy and was not the least restrictive method available for the promotion of the state's interest; therefore, it was unconstitutional. *Paschal v. State*, 2012 Ark. 127, 388 S.W.3d 429 (2012), rehearing denied, — S.W.3d —, 2012 Ark. LEXIS 214 (Ark. May 3, 2012).

**Applicability.**

Trial court did not err during defendant's trial in refusing to instruct a jury on the lesser offense of sexual assault in the second degree, in violation of subdivisions (a)(3)(A)-(B) of this section, on one count of rape, in violation of § 5-14-103(a)(3)(A), because sexual assault was not established by proof of the same or less than all of the elements required to establish rape, as required by § 5-1-110(b) to be a lesser-included offense. *Joyner v. State*, 2009 Ark. 168, 303 S.W.3d 54 (2009), cert. denied, *Joyner v. Arkansas*, 558 U.S. 1047, 130 S. Ct. 736, 175 L. Ed. 2d 514 (2009).

Defendant was not entitled to a bill of particulars, pursuant to § 16-85-301(a); a bill of particulars as to the precise time offenses were committed was not necessary because time was not material to allegations of rape, under § 5-14-103, and sexual assault in the second degree, under this section. *Wallis v. State*, 2010 Ark. App. 238, 374 S.W.3d 737 (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 259 (May 6, 2010).

In a family doctor's trial on two counts of second-degree sexual abuse, violations of this section, there was sufficient evidence that defendant used forcible compulsion to perpetrate the crimes where in each victim's sexual assault, there was forcible compulsion in the form of physical force or the threat of physical injury separate from the touching required for sexual contact. *Arendall v. State*, 2010 Ark. App. 358, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 367 (June 24, 2010).

Trial court did not abuse its discretion in denying defendant's post-trial request for a sentence reduction pursuant to § 16-

90-107(e) because defendant's 20-year sentence for second degree sexual assault, in violation of this section, fell within the statutory range. *Brown v. State*, 2010 Ark. 420, 378 S.W.3d 66 (2010).

In a case in which defendant was convicted of four counts of sexual assault of a minor, defendant fulfilled the role of temporary caretaker or person in a position of trust or authority under both § 5-14-124 and this section, as defendant was in a position to care for the victim while the victim was staying overnight in defendant's home. *Nelson v. State*, 2011 Ark. 429, 384 S.W.3d 534 (2011).

**Appellate Review.**

Defendant's second-degree sexual assault conviction, pursuant to subdivision (a)(3) of this section, was proper because defendant's argument that the state failed to offer proof that defendant touched the victim for the purpose of obtaining sexual gratification was not raised below. *Ross v. State*, 2010 Ark. App. 129, — S.W.3d — (2010).

Credibility arguments relating to a conviction for second-degree sexual assault were not preserved for appellate review because appellant presented different arguments at the trial court level; appellant argued that the charge was a lesser-included offense of rape and that the element of sexual gratification was not proven. Arguments not raised at trial were not addressed for the first time on appeal, and appellant was not able to change the grounds for his directed verdict motion on appeal. *Clayton v. State*, 2012 Ark. App. 199, — S.W.3d — (2012).

**Evidence.**

Evidence was sufficient to support defendant's conviction for second-degree sexual assault where the victim and a witness both testified that defendant pulled down the victim's pants and was touching her, despite defendant's contention that he was merely examining a bug bite when he removed the clothes. *Hull v. State*, 96 Ark. App. 280, 241 S.W.3d 302 (2006).

Trial court properly denied defendant's motion for a directed verdict during his trial for sexual assault of his daughter, in violation of subdivision (a)(3) of this section, because the testimony of the victim that defendant "would rub my behind,"



and that he put his private part “in my behind,” was substantial evidence to support the guilty verdict. *Brown v. State*, 374 Ark. 341, 288 S.W.3d 226 (2008).

Where the child victim testified that defendant inappropriately touched her and sexually penetrated her, the evidence was sufficient to support his conviction for second-degree sexual assault under this section. *Swaim v. State*, 2009 Ark. App. 557, — S.W.3d — (2009).

Where defendant admitted that he inappropriately touched an eleven-year-old girl while she was sleeping, the jury could infer that his actions were motivated by a desire for sexual gratification. The evidence was sufficient to support his conviction for sexual assault in the second degree in violation of subdivision (a)(3) of this section; the trial court did not err by denying his motion for a directed verdict. *Davis v. State*, 2009 Ark. App. 753, 386 S.W.3d 647 (2009).

Victim’s testimony alone supported appellant’s conviction for rape and sexual assault; moreover, the victim’s testimony illustrated that there were several different actions of sexual assault and rape—acts that could each be separated in time as involving distinct impulses. *Bryant v. State*, 2010 Ark. 7, 377 S.W.3d 152 (2010).

Evidence produced by the state at trial was sufficient for the jury to reasonably conclude that, by virtue of the living arrangement, appellant was placed in an apparent position of power or authority over the minor victim and that appellant was thus the victim’s guardian for the purposes of subdivision (a)(4)(A)(iii) of this section and §§ 5-14-103(a)(4)(A)(i) and 5-14-101(3), thus the jury verdict was supported by substantial evidence. *Pack v. State*, 2010 Ark. App. 82, — S.W.3d — (2010).

To support a second-degree sexual assault conviction, pursuant to subdivision (a)(3) of this section, the state did not have to provide direct proof that the act was done for sexual gratification because it could be assumed that the desire for sexual gratification was a plausible reason for sexual contact, as defined by § 5-14-101(10). *Ross v. State*, 2010 Ark. App. 129, — S.W.3d — (2010).

In a case in which defendant appealed his conviction for sexual assault in the second degree, in violation of subdivision (a)(4)(A)(iii) of this section, he argued un-

successfully that the trial court erred in denying his motion for a directed verdict. The victim’s testimony alone was sufficient to support defendant’s conviction, and the jury was not required to believe defendant’s testimony that he had not touched the victim’s breast. *Chavez v. State*, 2010 Ark. App. 161, — S.W.3d — (2010).

In a case in which defendant appealed his conviction for sexual assault in the second degree, in violation of subdivision (a)(4)(A)(iii) of this section, he complained that a transcript of his interview at the police department was obtained with the assistance of a translator who was not certified by the Administrative Office of the Courts and was admitted into evidence in violation of Ark. R. Evid. 1009. While it was true that the translation was not made by a qualified translator as set forth in Rule 1009, and defendant objected on that basis, he did not object to the admission of the transcript at trial; in fact, his attorney stipulated at trial that the transcript reflected the interview; furthermore, the victim’s testimony alone is sufficient to support defendant’s conviction. *Chavez v. State*, 2010 Ark. App. 161, — S.W.3d — (2010).

Conviction for sexual assault in the second degree for violating subdivision (a)(3) of this section was supported by sufficient evidence because it was at least plausible that defendant’s act of touching the victim’s vaginal area with his foot, after which he ordered her not to tell anyone and later wrote a letter of apology, was done for the purpose of sexual gratification. *Elliott v. State*, 2010 Ark. App. 185, — S.W.3d — (2010).

Despite the large amount of time between the events giving rise to a witness’s testimony and defendant’s trial for second degree sexual assault, in violation of this section, evidence about an alleged sexual assault occurring 34 years prior was relevant to defendant’s character and as an aggravating circumstance under § 16-97-103. *Brown v. State*, 2010 Ark. 420, 378 S.W.3d 66 (2010).

Eight-year-old victim’s testimony alone was sufficient evidence to support defendant’s conviction for second degree sexual assault in violation of this section. The victim’s parents and a police detective also told the jury that the victim had recounted the same information to them. To

the extent there were inconsistencies in the victim's testimony, or that of other state witnesses, it was a matter of credibility and was for the jury to decide. *Brown v. State*, 2010 Ark. 420, 378 S.W.3d 66 (2010).

There was sufficient evidence for a jury to convict defendant of first-degree sexual abuse. The state proved sexual contact through the victim's testimony that defendant rubbed his penis on her vagina. *Estrada v. State*, 2011 Ark. 3, 376 S.W.3d 395 (2011).

Because an eight-year-old child victim's testimony was enough to support a conviction, there was sufficient evidence to support defendant's convictions for sexual indecency with a child and second-degree sexual assault under § 5-14-110(a)(2)(A) and subdivision (a)(3) of this section, respectively. *Newton v. State*, 2012 Ark. App. 91, — S.W.3d — (2012).

Evidence was sufficient to convict defendant of second-degree sexual assault under subdivision (a)(3) of this section because the child victim told a detective about a magic thumb game she played with defendant, pointed to the genitalia area of an anatomically correct doll when describing the magic thumb, and said that when it got big, she made it little again. *King v. State*, 2012 Ark. App. 253, — S.W.3d — (2012).

Revocation of probation was proper, because the appellate court was bound to defer to the trial court on issues of credibility, and the victim's testimony established each of the elements for committing second-degree sexual assault under subdivision (a)(1) of this section, when she indicated that the petitioner had her up against the wall and touched her buttocks and vagina. *Boykins v. State*, 2012 Ark. App. 263, — S.W.3d — (2012).

Substantial evidence existed to revoke defendant's suspended sentence for sale of cocaine based on a finding that he committed a new criminal offense under subdivision (a)(2)(A) of this section, because his sister-in-law testified defendant sexually assaulted her while she was asleep and a police officer testified his DNA matched the sample taken from the victim. *Wilson*

*v. State*, 2012 Ark. App. 566, — S.W.3d — (2012).

Trial court's delinquency adjudications finding that a juvenile committed three acts of sexual assault in the second degree, in violation of subdivision (a)(1) of this section, were appropriate because the trial court found that the testimony of each of the three victims as to the juvenile's making sexual contact with them, as defined by § 5-14-101(10), by inappropriately touching the victims in separate incidents was credible, and because the uncorroborated testimony of each of the victims of a sexual offense constituted sufficient evidence to support a finding of guilt. *D.D. v. State*, 2012 Ark. App. 637, — S.W.3d —, 2012 Ark. App. LEXIS 747 (Nov. 7, 2012).

### **Ineffective Assistance.**

In postconviction proceedings, the circuit court did not err in granting appellee a new trial on the charge of first degree sexual abuse under former § 5-14-108 [now this section] because trial counsel had been ineffective in failing to inquire as to whether any witnesses could testify regarding appellee's whereabouts during the month in which the victim testified that the offense occurred. This, coupled with counsel's failure to object to the testimony that placed the incident outside the range in the information, prejudiced appellee. *State v. Estrada*, 2013 Ark. 89, — S.W.3d — (2013).

### **Lesser Included Offense.**

In a criminal trial, the circuit court did not abuse its discretion in denying defendant's request to instruct the jury that second-degree sexual assault under subdivision (a)(3) of this section was a lesser offense included in rape of a person less than fourteen years of age, as defined in § 5-14-103(a)(3)(A), because the offense contained two elements not included in rape: defendant's age and marital status. Therefore, second-degree sexual assault was not a lesser offense included in rape. *Webb v. State*, 2012 Ark. 64, — S.W.3d — (2012).

**Cited:** *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007).



### 5-14-126. Sexual assault in the third degree.

(a) A person commits sexual assault in the third degree if the person:

(1) Engages in sexual intercourse or deviate sexual activity with another person who is not the actor's spouse, and the actor is:

(A) Employed with the Department of Correction, Department of Community Correction, Department of Human Services, or any city or county jail, and the victim is in the custody of the Department of Correction, Department of Community Correction, Department of Human Services, or any city or county jail;

(B) Employed or contracted with or otherwise providing services, supplies, or supervision to an agency maintaining custody of inmates, detainees, or juveniles, and the victim is in the custody of the Department of Correction, Department of Community Correction, Department of Human Services, or any city or county jail; or

(C) A mandated reporter under § 12-18-402(b) or a member of the clergy and is in a position of trust or authority over the victim and uses the position of trust or authority to engage in sexual intercourse or deviate sexual activity; or

(2)(A) Being a minor, engages in sexual intercourse or deviate sexual activity with another person who is:

(i) Less than fourteen (14) years of age; and

(ii) Not the person's spouse.

(B) It is an affirmative defense under this subdivision (a)(2) that the actor was not more than three (3) years older than the victim.

(b) It is no defense to a prosecution under this section that the victim consented to the conduct.

(c) Sexual assault in the third degree is a Class C felony.

**History.** Acts 2001, No. 1738, § 4; 2003, No. 1324, § 1; 2007, No. 363, § 1; 2009, No. 748, § 14; 2009, No. 758, § 4.

**A.C.R.C. Notes.** Acts 2009, No. 758, § 29, provided: "Contingent Effectiveness. This act shall not become effective unless an act of the Eighty-Seventh General Assembly repealing the Arkansas Child Maltreatment Act, § 12-12-501 et seq., and enacting a new Child Maltreatment Act, § 12-18-101 et seq., becomes

effective." The contingency in Acts 2009, No. 758, § 29, was met by Acts 2009, No. 749.

**Amendments.** The 2009 amendment by No. 748 substituted "a minor" for "under eighteen (18) years of age" in the introductory language of (a)(2)(A).

The 2009 amendment by No. 758 substituted "mandated reporter under §12-18-402(b)" for "professional under §12-12-507(b)" in (a)(1)(C).

### CASE NOTES

#### ANALYSIS

Constitutionality.

Evidence.

Statute of Limitations.

#### Constitutionality.

Defendant's due process and equal protection rights were not violated when he

was convicted of violating subdivision (a)(1)(B) of this section as he was not prosecuted for consensual sexual acts with the two victims, rather, he was prosecuted for using his position of trust and authority over the victims to engage in those acts; because the clergy was held in such a high regard, there was a legitimate reason for the state to criminalize a cler-

gyman's abuse of his trust and authority to procure sex. *Talbert v. State*, 367 Ark. 262, 239 S.W.3d 504 (2006).

Subdivision (a)(1)(B) of this section is not unconstitutionally vague as, after reading the statute's language, a person of ordinary intelligence would not believe that it was a crime, per se, for a member of the clergy to have a consensual relationship with someone; the statute makes clear that a clergyman must have misused his position of trust and authority to engage in a sexual relationship for a violation to occur. *Talbert v. State*, 367 Ark. 262, 239 S.W.3d 504 (2006).

#### **Evidence.**

Evidence was sufficient to support defendant's conviction for sexual assault in the third degree where testimony of the victims did not indicate a consensual relationship: (1) both victims testified that

they looked up to defendant as a minister and trusted him; (2) one victim testified that she was afraid of what might happen to her if she did not comply with his sexual requests; (3) that victim also testified that she was not attracted to defendant; (4) and the second victim testified that she told defendant that, because he was a minister, sex was not right. *Talbert v. State*, 367 Ark. 262, 239 S.W.3d 504 (2006).

#### **Statute of Limitations.**

There was sufficient evidence that the sexual assault against one victim occurred in 2002 and, therefore, was within the three-year statute of limitations of § 5-1-109(b)(2) where the victim testified that defendant, a minister, assaulted her while she was working for the church during the summer of 2002. *Talbert v. State*, 367 Ark. 262, 239 S.W.3d 504 (2006).

### **5-14-127. Sexual assault in the fourth degree.**

(a) A person commits sexual assault in the fourth degree if the person:

(1) Being twenty (20) years of age or older:

(A) Engages in sexual intercourse or deviate sexual activity with another person who is:

(i) Less than sixteen (16) years of age; and

(ii) Not the person's spouse; or

(B) Engages in sexual contact with another person who is:

(i) Less than sixteen (16) years of age; and

(ii) Not the person's spouse; or

(2) Engages in sexual contact with another person who is not the actor's spouse, and the actor is employed with the Department of Correction, Department of Community Correction, Department of Human Services, or any city or county jail, and the victim is in the custody of the Department of Correction, Department of Community Correction, Department of Human Services, or a city or county jail.

(b)(1) Sexual assault in the fourth degree under subdivisions (a)(1)(A) and (a)(2) of this section is a Class D felony.

(2) Sexual assault in the fourth degree under subdivision (a)(1)(B) of this section is a Class A misdemeanor if the person engages only in sexual contact with another person as described in subdivision (a)(1)(B) of this section.

**History.** Acts 2001, No. 1738, § 5; 2003, No. 1325, § 1; 2009, No. 630, § 1.

**Amendments.** The 2009 amendment, in (a), inserted (a)(2) and redesignated the remaining subdivisions; in (b), substi-

tuted "subdivisions (a)(1)(A) and (a)(2)" for "subdivision (a)(1)" in (b)(1), and substituted "(a)(1)(B)" for "(a)(2)" twice in (b)(2); and made related changes.



## CASE NOTES

## ANALYSIS

Burden of Proof.

Evidence.

Relationship with Other Laws.

Severance.

**Burden of Proof.**

Appellant's sexual assault conviction under § 5-14-127(a)(3) was affirmed where his argument that he reasonably believed that the victim was older than 16 was an affirmative defense under § 5-14-102(d)(1) and thus, the trial court properly concluded that he, rather than the State bore the burden of proof under § 5-1-111(d)(1). *Wright v. State*, 98 Ark. App. 271, 254 S.W.3d 755 (2007).

**Evidence.**

There was sufficient evidence to support a conviction for sexual assault in the fourth degree arising out of sexual intercourse with child because she was under the age of sixteen, and defendant was at least 20 years old. *White v. State*, 370 Ark. 284, 259 S.W.3d 410 (2007).

Evidence was sufficient to convict defendant under 18 U.S.C.S. § 2422(b) of attempting to persuade a minor to engage in sexual activity for which defendant could have been charged with a criminal offense, which under subdivision (a)(1) of this section and § 5-14-101(1)(A) included oral sex with a person under age 16; evidence was offered that defendant discussed sexual activity with a 15-year-old victim, and there was sufficient evidence to establish that defendant knew that the victim was under 16 given defendant's behavior indicating a consciousness of guilt, the victim's testimony, and the tran-

script of an online chat between defendant and a detective posing as the victim. *United States v. Langley*, 549 F.3d 726 (8th Cir. 2008).

Substantial evidence supported defendant's fourth-degree sexual assault conviction where the evidence was that the victim's sixteenth birthday was in October 2010, and the victim testified that she had a consensual-sexual relationship consisting of ten or more sexual encounters with defendant that started when she was a high school freshman and continued through her sophomore year, which would have been from the fall of 2009 until the fall of 2010 and into the spring of 2011. Moreover, defendant admitted that the relationship started slightly before the victim's sixteenth birthday. *Sellers v. State*, 2013 Ark. App. 210, — S.W.3d — (2013).

**Relationship with Other Laws.**

Section 5-14-110 prohibits the solicitation of conduct that is already criminal under Arkansas law, and offers to engage in illegal transactions enjoy no First Amendment protection. *Neely v. McDaniel*, 677 F.3d 346 (8th Cir. 2012), rehearing denied, — F.3d —, 2012 U.S. App. LEXIS 12159 (8th Cir. Ark. June 14, 2012).

**Severance.**

Trial court was not required to sever a charge for exposure to the Human Immunodeficiency Virus (HIV) under Ark. R. Crim. P. 22.2 because the exposure to HIV was committed as part of a single scheme with a sexual assault in the fourth degree. It was discretionary whether or not to sever under Rule 22.2(b)(i). *White v. State*, 370 Ark. 284, 259 S.W.3d 410 (2007).

### **5-14-128. Registered offender living near school, public park, youth center, or daycare prohibited.**

(a) It is unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to reside within two thousand feet (2,000') of the property on which any public or private elementary or secondary school, public park, youth center, or daycare facility is located.

(b)(1) It is not a violation of this section if the property on which the sex offender resides is owned and occupied by the sex offender and was

purchased prior to the date on which the public or private elementary or secondary school, public park, youth center, or daycare facility was established.

(2) The exclusion in subdivision (b)(1) of this section does not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after the public or private elementary or secondary school, public park, youth center, or daycare facility is established.

(c)(1)(A) With respect to a public or private elementary or secondary school or a daycare facility, it is not a violation of this section if the sex offender resides on property he or she owns prior to July 16, 2003.

(B) With respect to a public park or youth center, it is not a violation of this section if the sex offender resides on property he or she owns prior to July 31, 2007.

(2)(A) The exclusion in subdivision (c)(1)(A) of this section does not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after July 16, 2003.

(B) The exclusion in subdivision (c)(1)(B) of this section does not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense on or after July 31, 2007.

(d) A sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who knowingly violates a provision of this section is guilty of a Class D felony.

(e)(1) A person who is charged with violating this section shall be ordered as a condition of his or her release from custody not to return to the location where he or she was residing that was located within two thousand feet (2,000') of a public or private elementary or secondary school, public park, youth center, or daycare facility until the charge is adjudicated.

(2) The court having jurisdiction over the charge may order that the defendant be allowed to return to his or her residence before the adjudication of the charge if good cause is shown.

(f) As used in this section:

(1) "Public park" means any property owned or maintained by this state or a county, city, or town in this state for the recreational use of the public; and

(2) "Youth center" means any building, structure, or facility owned or operated by a not-for-profit organization or by this state or a county, city, or town in this state for use by minors to promote the health, safety, or general welfare of the minors.

**History.** Acts 2003, No. 330, § 3; 2007, No. 818, § 1; 2009, No. 1406, § 1. inserted present (e) and redesignated (e) as (f).

**Amendments.** The 2009 amendment



## RESEARCH REFERENCES

**ALR.** Validity, Construction, and Application of Statutory and Municipal Enactments and Conditions of Release Prohib-

iting Sex Offenders from Parks. 40 A.L.R.6th 419.

## CASE NOTES

## ANALYSIS

Constitutionality.  
Construction With Other Law.  
Sufficiency of Evidence.

**Constitutionality.**

Because this statutory plan calls for a particularized risk assessment of sex offenders, which increases the likelihood that the residency restriction is not excessive in relation to the rational purpose of minimizing the risk of sex crimes against minors, and the "rational connection" of the residency restriction is even closer to a nonpunitive purpose, this statute is not an unconstitutional *ex post facto* law. *Weems v. Little Rock Police Dep't*, 453 F.3d 1010 (8th Cir. 2006), rehearing denied, *Weems v. Johnson*, — F.3d —, 2006 U.S. App. LEXIS 21238 (8th Cir. Aug. 18, 2006), cert. denied, *Weems v. Johnson*, 550 U.S. 917, 127 S. Ct. 2128, 167 L. Ed. 2d 862 (2007).

Employing the normal rule that terms are given their ordinary and usually accepted meaning and construing "reside" to mean to dwell permanently or continuously, this section does not infringe on a constitutional right to intrastate travel. *Weems v. Little Rock Police Dep't*, 453 F.3d 1010 (8th Cir. 2006), rehearing denied, *Weems v. Johnson*, — F.3d —, 2006 U.S. App. LEXIS 21238 (8th Cir. Aug. 18, 2006), cert. denied, *Weems v. Johnson*, 550 U.S. 917, 127 S. Ct. 2128, 167 L. Ed. 2d 862 (2007).

Under the flexible Mathews factors, the procedural avenues afforded by the residency requirement in this section are constitutionally adequate and provide notice to offenders of the risk assessment process and a meaningful opportunity to be heard. *Weems v. Little Rock Police Dep't*, 453 F.3d 1010 (8th Cir. 2006), rehearing denied, *Weems v. Johnson*, — F.3d —, 2006 U.S. App. LEXIS 21238 (8th Cir. Aug. 18, 2006), cert. denied, *Weems v. Johnson*, 550 U.S. 917, 127 S. Ct. 2128, 167 L. Ed. 2d 862 (2007).

This section, which prohibits registered high risk sex offenders from living within 2,000 feet of a school or daycare center, was rationally related to the state's legitimate interest in protecting children from the most dangerous sex offenders and did not contravene the doctrine of substantive due process or equal protection of the laws. *Weems v. Little Rock Police Dep't*, 453 F.3d 1010 (8th Cir. 2006), rehearing denied, *Weems v. Johnson*, — F.3d —, 2006 U.S. App. LEXIS 21238 (8th Cir. Aug. 18, 2006), cert. denied, *Weems v. Johnson*, 550 U.S. 917, 127 S. Ct. 2128, 167 L. Ed. 2d 862 (2007).

Sex Offender Screening and Risk Assessment Committee's use of statements the sex offender made during the assessment process, under a grant of immunity, to assess him as a level four offender, did not violate his privilege against self-incrimination under Ark. Const., Art. 2, § 8. Despite subsection (a) of this section, the Supreme Court of Arkansas held that the assessment and ultimate classification of a sex offender pursuant to the Sex Offender Registration Act are not criminal in nature; and one's privilege against self-incrimination may only be violated where one's own statements are used against one in a proceeding criminal in nature. *Parkman v. Sex Offender Screening & Risk Assessment Comm.*, 2009 Ark. 205, 307 S.W.3d 6 (2009).

**Construction With Other Law.**

Definition of "residency" for purposes of registration in § 12-12-903(10)(B) appears in a different chapter of the Arkansas Code than the residency restriction in subsection (a) of this section, and the definition does not by its terms apply to the criminal statute that makes it unlawful for a sex offender "to reside" within 2000 feet of a school or daycare facility. *Weems v. Little Rock Police Dep't*, 453 F.3d 1010 (8th Cir. 2006), rehearing denied, *Weems v. Johnson*, — F.3d —, 2006 U.S. App. LEXIS 21238 (8th Cir. Aug. 18,

2006), cert. denied, *Weems v. Johnson*, 550 U.S. 917, 127 S. Ct. 2128, 167 L. Ed. 2d 862 (2007).

#### **Sufficiency of Evidence.**

Defendant's convictions for failure to comply with registration and reporting requirements applicable to sex offenders and for residing within 2000 feet of a daycare facility as a level 4 sex offender were proper where the evidence supported a finding that he resided in a particular trailer that was shown to be within 2000 feet of a daycare facility because: (1) there was evidence that the trailer's previous resident had moved out approximately two months earlier and that the utilities

for the trailer had been reestablished in defendant's name; (2) men's clothing and toiletries were found in the trailer, as were prescription-medication bottles bearing defendant's name; (3) the owner of the trailer admitted that defendant had approached him three times about renting the trailer; (4) defendant's father admitted that defendant had intended to move to the trailer; and (5) defendant had a key to the trailer when arrested. Although defendant argued he was only in the trailer to do repair work, no evidence of repair work was observed in the trailer. *Green v. State*, 2013 Ark. App. 63, — S.W.3d — (2013).

### **5-14-129. Registered offender working with children prohibited.**

(a) It is unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to knowingly:

(1) Engage in an occupation or participate in a volunteer position that requires the sex offender to work or interact primarily and directly with a child under sixteen (16) years of age; or

(2) Accept work as a self-employed person, an independent contractor, or an employee or agent of a self-employed person or independent contractor that is to be performed at a privately owned daycare facility when the privately owned daycare facility has in its care a child.

(b) A violation of this section is a Class D felony.

**History.** Acts 2005, No. 1779, § 1; 2011, No. 1023, § 1; 2013, No. 1125, § 5.

**Amendments.** The 2011 amendment added (a)(2); and added "knowingly" at the end of the introductory language of (a).

The 2013 amendment substituted "privately owned" for "private" in (a)(2); and

substituted "A violation of this section is a" for "A sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who knowingly violates this section if guilty of" in (b).

### **CASE NOTES**

#### **Interpretation.**

Sex Offender Screening and Risk Assessment Committee's use of statements the sex offender made during the assessment process, under a grant of immunity, to assess him as a level four offender, did not violate his privilege against self-incrimination under Ark. Const., Art. 2, § 8. Despite subsection (a) of this section, the Supreme Court of Arkansas held that the assessment and ultimate classification of a sex offender pursuant to the Sex Of-

fender Registration Act are not criminal in nature; and one's privilege against self-incrimination may only be violated where one's own statements are used against one in a proceeding criminal in nature. *Parkman v. Sex Offender Screening & Risk Assessment Comm.*, 2009 Ark. 205, 307 S.W.3d 6 (2009).

Circuit court's finding that defendant failed to comply as a sex offender under subsection (a) of this section because defendant worked at a daycare was against



the preponderance of the evidence, as evidence demonstrated that defendant's work at the daycare was carpentry work that was in no way work or interaction with children under 16. *Newman v. State*, 2011 Ark. 112, 380 S.W.3d 395 (2011).

**5-14-130. Registered offender — Incorrect permanent physical address on identification cards or driver's license prohibited.**

(a) It is unlawful for a person who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., or required to register as a sex offender in any other state to knowingly:

(1) Provide false information to obtain an identification card or a driver's license under Title 27 of this Arkansas Code that indicates an incorrect permanent physical address for his or her residence; or

(2) Possess an identification card or a driver's license issued under Title 27 of this Arkansas Code that indicates an incorrect permanent physical address for his or her residence.

(b) It is an affirmative defense to a violation of subdivision (a)(2) of this section if the sex offender has provided notice of a change of address as required by § 27-16-506.

(c)(1) A violation of subdivision (a)(1) of this section is a Class D felony.

(2) A violation of subdivision (a)(2) of this section is a Class A misdemeanor.

**History.** Acts 2007, No. 392, § 1.

**5-14-131. Registered offender living near victim or having contact with victim prohibited.**

(a) As used in this section, "victim" means a victim of a sex offense for which a person is required to register as a sex offender under the Sex Offender Registration Act of 1997, § 12-12-901 et seq.

(b) It is unlawful for a person who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to knowingly:

(1) Reside within two thousand feet (2,000') of the residence of his or her victim; or

(2) Have direct or indirect contact with his or her victim for the purpose of harassment under § 5-71-208.

(c)(1) It is an affirmative defense to a prosecution for a violation of subdivision (b)(1) of this section if the property where the sex offender resides is owned and occupied by the sex offender and was purchased prior to the date on which his or her victim began residing within two thousand feet (2,000') of the residence of the sex offender.

(2) The affirmative defense in subdivision (c)(1) of this section is not available to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense involving his or her victim after his or her victim began residing within two thousand feet (2,000') of the residence of the sex offender.

(d)(1) It is an affirmative defense to a prosecution for a violation of subdivision (b)(1) of this section if the sex offender resides on property he or she owned prior to March 21, 2007.

(2) The affirmative defense in subdivision (d)(1) of this section is not available to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense involving his or her victim after March 21, 2007.

(e) Upon conviction, a person who violates this section is guilty of a Class D felony.

**History.** Acts 2007, No. 394, § 1.

### CASE NOTES

#### **Interpretation.**

Sex Offender Screening and Risk Assessment Committee's use of statements the sex offender made during the assessment process, under a grant of immunity, to assess him as a level four offender, did not violate his privilege against self-incrimination under Ark. Const., Art. 2, § 8. Despite subdivision (b)(1) of this section, the Supreme Court of Arkansas held that

the assessment and ultimate classification of a sex offender pursuant to the Sex Offender Registration Act are not criminal in nature; and one's privilege against self-incrimination may only be violated where one's own statements are used against one in a proceeding criminal in nature. *Parkman v. Sex Offender Screening & Risk Assessment Comm.*, 2009 Ark. 205, 307 S.W.3d 6 (2009).

### **5-14-132. Registered offender prohibited from entering upon school campus — Exception.**

(a) As used in this section:

(1) "Campus" means the real property, a building, or any other improvement in this state owned, leased, rented, or controlled by or for the operation of a public school; and

(2) "Public school" means any school in this state that is:

(A) A public school operated by a public school district;

(B) A charter school established under the Public School Funding Act of 2003, § 6-20-2301 et seq.;

(C) A state-funded prekindergarten program operated by a public school or an education service cooperative;

(D) The Arkansas School for the Blind;

(E) The Arkansas School for the Deaf;

(F) The Arkansas School for Mathematics, Sciences, and the Arts;

(G) An educational facility of the Division of Youth Services of the Department of Human Services or contracting with the Division of Youth Services; or

(H) An educational facility of the Division of Developmental Disabilities Services of the Department of Human Services.

(b) It is unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to knowingly enter upon the campus of a public school.

(c) It is not a violation of this section if the sex offender:



(1) Is less than twenty-two (22) years of age and is a student enrolled in a grade kindergarten through twelve (K-12) program;

(2) Enters upon the campus for the purpose of attending a school-sponsored event for which an admission fee is charged or tickets are sold or distributed, a graduation ceremony, or a baccalaureate ceremony;

(3) Enters upon the campus on a day that is not designated a student contact day by the public school's calendar or on a day in which no school-sponsored event is taking place upon the campus; or

(4) Is the parent or guardian of a student enrolled in a public school and enters upon the campus where the student is enrolled for the purpose of:

(A) Delivering to the student medicine, food, or personal items if the medicine, food, or personal items are delivered directly to the public school's office; or

(B) Attending a scheduled parent-teacher conference if the sex offender is escorted to and from the scheduled parent-teacher conference by a designated public school official or employee.

(d)(1) A sex offender who is the parent or guardian of a student enrolled in a public school and wishes to enter upon the campus where the student is enrolled for any other purpose shall give reasonable notice to the public school principal or his or her designee.

(2)(A) The public school principal or his or her designee may allow the parent or guardian sex offender to enter upon the campus so long as there is a designated public school official or employee available to escort and supervise the parent or guardian sex offender while he or she remains on campus.

(B) If a designated public school official or employee is not available at the time the parent or guardian sex offender wishes to enter upon the campus, the parent or guardian sex offender shall not enter upon the campus until he or she is notified that a designated public school official or employee is available.

(e) Upon conviction, any sex offender who violates this section is guilty of a Class D felony.

**History.** Acts 2007, No. 992, § 1; 2009, No. 748, § 15.

**Amendments.** The 2009 amendment, in (c)(1), substituted "Less than twenty-

two (22) years of age" for "a minor" and inserted "enrolled in a grade kindergarten through twelve (K-12) program"; and made changes throughout (c) and (d).

## CASE NOTES

### Interpretation.

Sex Offender Screening and Risk Assessment Committee's use of statements the sex offender made during the assessment process, under a grant of immunity, to assess him as a level four offender, did not violate his privilege against self-incrimination under Ark. Const., Art. 2, § 8. Despite subsection (b) of this section, the

Supreme Court of Arkansas held that the assessment and ultimate classification of a sex offender pursuant to the Sex Offender Registration Act are not criminal in nature; and one's privilege against self-incrimination may only be violated where one's own statements are used against one in a proceeding criminal in nature. *Parkman v. Sex Offender Screening & Risk*

Assessment Comm., 2009 Ark. 205, 307  
S.W.3d 6 (2009).

**5-14-133. Registered offender prohibited from entering a water park owned or operated by a local government.**

(a) As used in this section, “water park” means a recreational facility that has among its features a swimming pool and is open to the general public.

(b) It is unlawful for a person who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to knowingly enter a water park owned or operated by a local government.

(c) A violation of this section is a Class D felony.

**History.** Acts 2011, No. 816, § 1.

**5-14-134. Registered offender prohibited from entering a swimming area or children’s playground contained within an Arkansas State Park.**

(a) As used in this section:

(1) “Arkansas State Park” means a state park classified or reclassified as an official state park under § 22-4-201(1) or § 22-4-202;

(2) “Children’s playground” means a place with a specific design for children to be able to play there, whether indoor or outdoor; and

(3) “Swimming area” means a place with a specific design for people to swim, including without limitation a beach, a swimming pool, and a water park.

(b) It is unlawful for a person who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to knowingly enter a swimming area or children’s playground contained within an Arkansas State Park.

(c) A violation of this section is a Class D felony.

**History.** Acts 2013, No. 39, § 1.

**SUBCHAPTER 2 — MEDICAL RECORDS OF PERSONS CHARGED WITH SEX CRIMES**

**SECTION.**

5-14-202. Access by prosecutors to medical records of persons

charged with sex crimes —  
Victim notification of  
health risk.

**5-14-202. Access by prosecutors to medical records of persons charged with sex crimes — Victim notification of health risk.**

(a)(1) Through a warrant issued by a judicial officer under Rule 13 of the Arkansas Rules of Criminal Procedure, a prosecuting attorney of



this state is entitled access to a relevant medical record of a person charged with having committed a sex crime against another person, which act could have exposed the victim to a disease carried by the alleged offender.

(2)(A) An application by a prosecuting attorney for a relevant medical record shall describe with particularity the person whose relevant medical record is to be obtained and shall be supported by one (1) or more affidavits or recorded testimony before a judicial officer particularly setting forth the facts and circumstances tending to show that the person may present a danger to the health of a victim of a sex crime.

(B) If the judicial officer finds that the application meets the requirements of subdivision (a)(2)(A) of this section and that, on the basis of the proceeding before the judicial officer, there is reasonable cause to believe that the relevant medical record should be disclosed, the judicial officer shall issue a warrant directing disclosure of the medical record to the prosecuting attorney.

(b) Upon service of a warrant, a person having custody of a relevant medical record shall grant access to the prosecuting attorney and is not subject to any liability for granting the access.

(c)(1) If a prosecuting attorney after reviewing a medical record determines that a victim is subject to a health risk as a result of a sex crime, the prosecuting attorney may convey that health risk information to the victim, and the prosecuting attorney is not subject to any liability for disclosing that health risk information to the victim.

(2)(A) The prosecuting attorney may disclose the health risk information to the victim only.

(B) However, if the victim is a minor or is mentally incompetent, then the prosecuting attorney may disclose the health risk information to the victim's parent or legal guardian only.

(d) [Repealed.]

(e) The prosecuting attorney is not subject to any liability to the victim for failing to obtain a medical record or failing to disclose health risk information to the victim.

(f) This subchapter does not repeal or supersede any rule of evidence or rule of criminal procedure that would allow the admissibility of a medical record as evidence in a criminal proceeding.

**History.** Acts 2001, No. 1709, § 2; inserted present (d) and redesignated the 2011, No. 1186, § 1; 2013, No. 1125, § 6. remaining subsections accordingly.

**Amendments.** The 2011 amendment The 2013 amendment deleted (d).

## CHAPTER 16

### VOYEURISM OFFENSES

#### SECTION.

5-16-101. Crime of video voyeurism.

5-16-102. Voyeurism.

**5-16-101. Crime of video voyeurism.**

(a) It is unlawful to use any camera, videotape, photo-optical, photoelectric, or any other image recording device for the purpose of secretly observing, viewing, photographing, filming, or videotaping a person present in a residence, place of business, school, or other structure, or any room or particular location within that structure, if that person:

- (1) Is in a private area out of public view;
- (2) Has a reasonable expectation of privacy; and
- (3) Has not consented to the observation.

(b) It is unlawful to knowingly use a camcorder, motion picture camera, photographic camera of any type, or other equipment that is concealed or disguised to secretly or surreptitiously videotape, film, photograph, record, or view by electronic means a person:

(1) For the purpose of viewing any portion of the person's body that is covered with clothing and for which the person has a reasonable expectation of privacy;

(2) Without the knowledge or consent of the person being videotaped, filmed, photographed, recorded, or viewed by electronic means; and

(3) Under circumstances in which the person being videotaped, filmed, photographed, recorded, or viewed by electronic means has a reasonable expectation of privacy.

(c)(1) A violation of subsection (a) of this section is a Class D felony.

(2)(A) A violation of subsection (b) of this section is a Class B misdemeanor.

(B) However, a violation of subsection (b) of this section is a Class A misdemeanor if:

(i) The person who created the video recording, film, or photo obtained as described in subsection (b) distributed or transmitted it to another person; or

(ii) The person who created the video recording, film, or photo obtained as described in subsection (b) posted it in a format accessible by another person via the Internet.

(d) The provisions of this section do not apply to any of the following:

(1) Video recording or monitoring conducted under a court order from a court of competent jurisdiction;

(2) Security monitoring operated by or at the direction of an occupant of a residence;

(3) Security monitoring operated by or at the direction of the owner or administrator of a place of business, school, or other structure;

(4) Security monitoring operated in a motor vehicle used for public transit;

(5) Security monitoring and observation associated with a correctional facility, regardless of the location of the monitoring equipment;

(6) Video recording or monitoring conducted by a law enforcement officer within the official scope of his or her duty; or

(7) Videotaping under § 12-18-615(b).



**History.** Acts 1999, No. 757, § 1; 2001, No. 532, § 1; 2007, No. 187, § 1; 2009, No. 330, § 1; 2009, No. 758, § 5.

**A.C.R.C. Notes.** Acts 2009, No. 758, § 29, provided: “Contingent Effectiveness. This act shall not become effective unless an act of the Eighty-Seventh General Assembly repealing the Arkansas Child Maltreatment Act, § 12-12-501 et seq., and enacting a new Child Maltreatment Act, § 12-18-101 et seq., becomes

effective.” The contingency in Acts 2009, No. 758, § 29, was met by Acts 2009, No. 749.

**Amendments.** The 2009 amendment by No. 330, in (c)(2), inserted (c)(2)(B) and redesignated the remaining text accordingly.

The 2009 amendment by No. 758 made a minor stylistic change in (d)(1), and substituted “under § 12-18-615(b)” for “pursuant to § 12-12-508(b)” in (d)(7).

## 5-16-102. Voyeurism.

(a) As used in this section:

(1) “Nude or partially nude” means any person who has less than a fully opaque covering over the genitals, pubic area, buttocks, or breast of a female;

(2) “Private place” means a place where a person may reasonably expect to be safe from being observed without his or her knowledge and consent; and

(3) “Public accommodation” means a business, accommodation, refreshment, entertainment, recreation, or transportation facility where a good, service, facility, privilege, advantage, or accommodation is offered, sold, or otherwise made available to the public.

(b) A person commits the offense of voyeurism if for the purpose of sexual arousal or gratification, he or she knowingly:

(1) Without the consent of each person who is present in the private place, looks into a private place that is, or is part of, a public accommodation and in which a person may reasonably be expected to be nude or partially nude; or

(2) Enters another person’s private property without the other person’s consent and looks into any person’s dwelling unit if all of the following apply:

(A) The person looks into the dwelling with the intent to intrude upon or interfere with a person’s privacy;

(B) The person looks into a part of the dwelling in which an individual is present;

(C) The individual present has a reasonable expectation of privacy in that part of the dwelling; and

(D) The individual present does not consent to the person’s looking into that part of the dwelling.

(c)(1) Except as provided in subdivision (c)(2) of this section, a violation of this section is a Class A misdemeanor.

(2) A violation of this section is a Class D felony if:

(A) A victim is under seventeen (17) years of age; and

(B) The person who commits the offense holds a position of trust or authority over the victim.

**History.** Acts 2005, No. 1642, § 1; 2007, No. 187, § 2.

RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of assembly, Criminal Law, 28 U. Ark. Little Legislation, 2005 Arkansas General As- Rock L. Rev. 335.

CHAPTER 18

THE HUMAN TRAFFICKING ACT OF 2013

SECTION.

- 5-18-101. Title.
- 5-18-102. Definitions.
- 5-18-103. Trafficking of persons.
- 5-18-104. Patronizing a victim of human trafficking.

SECTION.

- 5-18-105. Enhanced liability of an organization.

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**A.C.R.C. Notes.** Acts 2013, No. 132, § 1, provided: “Title. This act shall be cited as the ‘Arkansas Human Trafficking Act of 2013’.”

Acts 2013, No. 133, § 1, provided: “Title. This act shall be cited as the ‘Arkansas Human Trafficking Act of 2013’.”

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5-18-101. Title.

This chapter shall be known as and may be cited as the “Human Trafficking Act of 2013”.

**History.** Acts 2013, No. 132, § 3; 2013, No. 133, § 3.

5-18-102. Definitions.

As used in this chapter:

- (1) “Commercial sexual activity” means a sexual act or sexually explicit performance for which anything of value is given, promised, or received, directly or indirectly, by a person;
- (2) “Debt bondage” means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of the personal services of a person under his or her control as a security for debt, if:
  - (A) The value of the debtor’s personal services or of the personal services of a person under his or her control as reasonably assessed is not applied toward the liquidation of the debt;
  - (B) The length and nature of the debtor’s personal services or of the personal services of a person under his or her control are not respectively limited and defined; or
  - (C) The principal amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred;
- (3) “Extortion” means the obtaining of property, labor, a service, credit, a commercial sexual activity, or a sexually explicit performance



from another person or of an official act of a public officer through a wrongful use of force or fear or under color of official right;

(4) "Financial harm" means extortion of credit, criminal violation of the usury laws, or employment contracts that violate the statutes of frauds, § 4-59-101;

(5) "Involuntary servitude" means the inducement or compulsion of a person to engage in labor, services, or commercial sexual activity by means of:

(A) A scheme, plan, or pattern of behavior with a purpose to cause a person to believe that if he or she does not engage in labor, services, or commercial sexual activity, he or she or another person will suffer serious physical injury or physical restraint;

(B) Abuse or threatened abuse of the legal process;

(C) The causing of or the threat to cause serious harm to a person;

(D) Physically restraining or threatening to physically restrain another person;

(E) The kidnapping of or threat to kidnap a person;

(F) The taking of another person's personal property or real property;

(G) The knowing destruction, concealment, removal, confiscation, or possession of an actual or purported passport, other immigration document, or other actual or purported government identification document of another person;

(H) Extortion or blackmail;

(I) Deception or fraud;

(J) Coercion, duress, or menace;

(K) Debt bondage;

(L) Peonage; or

(M) The facilitation or control of a victim's access to an addictive controlled substance;

(6) "Labor" means work of economic or financial value;

(7) "Menace" means a possible danger or threat;

(8) "Minor" means a person less than eighteen (18) years of age;

(9) "Organization" means the same as defined in § 5-2-501;

(10) "Peonage" means holding a person against his or her will to pay off a debt;

(11) "Serious harm" means any harm, whether physical or nonphysical, including without limitation psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the victim to perform or to continue performing labor or service, a commercial sex act, or a sexually explicit performance in order to avoid incurring that harm;

(12) "Service" means an act committed at the behest of, under the supervision of, or for the benefit of another person;

(13)(A) "Sex act" means any touching of the sexual or other intimate parts of another person for the purpose of gratifying the sexual desire of a person.

(B) "Sex act" includes without limitation the touching of the person as well as touching by the person, whether directly or through clothing;

(14)(A) "Sexually explicit performance" means an act or show, whether public or private, live, photographed, recorded, or videotaped with a purpose to:

(i) Either:

(a) Appeal to the prurient interest; or

(b) Depict, in a patently offensive way, a sex act; and

(ii) Do so in a way that lacks literary, artistic, political, or scientific value.

(B) "Sexually explicit performance" includes without limitation any performance that depicts a sex act by a minor or that would create criminal liability under § 5-27-303 or § 5-27-304; and

(15) "Victim of human trafficking" means a person who has been subjected to trafficking of persons, § 5-18-103.

**History.** Acts 2013, No. 132, § 3; 2013, No. 133, § 3.

### **5-18-103. Trafficking of persons.**

(a) A person commits the offense of trafficking of persons if he or she knowingly:

(1) Recruits, harbors, transports, obtains, entices, solicits, isolates, provides, or maintains a person knowing that the person will be subjected to involuntary servitude;

(2) Benefits financially or benefits by receiving anything of value from participation in a venture under subdivision (a)(1) of this section;

(3) Subjects a person to involuntary servitude; or

(4) Recruits, entices, solicits, isolates, harbors, transports, provides, maintains, or obtains a minor for commercial sexual activity.

(b) It is not a defense to prosecution under subdivision (a)(4) of this section that the actor:

(1) Did not have knowledge of a victim's age; or

(2) Mistakenly believed a victim was not a minor.

(c)(1) Trafficking of persons is a Class A felony.

(2) Trafficking of persons is a Class Y felony if a victim was a minor at the time of the offense.

(d) In addition to any other sentence authorized by this section, a person who violates this section by offering to pay, agreeing to pay, or paying a fee to engage in sexual activity upon conviction shall be ordered to pay a fine of two hundred fifty dollars (\$250) to be deposited into the Safe Harbor Fund for Sexually Exploited Children.

**History.** Acts 2013, No. 132, § 3; 2013, No. 133, § 3; 2013, No. 1257, § 4.

**A.C.R.C. Notes.** Acts 2013, No. 1257, § 1, provided: Legislative findings.

"The General Assembly finds that:

"(1) The criminal justice system is not the appropriate place for sexually exploited children because it serves to re-traumatize them and to increase their feelings of low self-esteem;



“(2) Both federal and international law recognize that sexually exploited children are the victims of crime and should be treated as such;

“(3) Sexually exploited children should, when possible, be diverted into services that address the needs of these children outside of the justice system; and

“(4) Sexually exploited children deserve the protection of child welfare services, including diversion, crisis intervention, counseling, and emergency housing services.”

Acts 2013, No. 1257, § 2, provided: Legislative intent.

“(1) The intent of this act is to protect a child from further victimization after the child is discovered to be a sexually ex-

ploited child by ensuring that a child protective response is in place in the state.

“(2) This is to be accomplished by presuming that any child engaged in prostitution or solicitation is a victim of sex trafficking and providing these children with the appropriate care and services when possible.

“(3) In determining the need for and capacity of services that may be provided, the Department of Human Services shall recognize that sexually exploited children have separate and distinct service needs according to gender, and every effort should be made to ensure that these children are not prosecuted or treated as juvenile delinquents, but instead are given the appropriate social services.”

#### **5-18-104. Patronizing a victim of human trafficking.**

(a) A person commits the offense of patronizing a victim of human trafficking if he or she knowingly engages in commercial sexual activity with another person knowing that the other person is a victim of human trafficking.

(b)(1) Patronizing a victim of human trafficking is a Class B felony.

(2) Patronizing a victim of human trafficking is a Class A felony if the victim was a minor at the time of the offense.

**History.** Acts 2013, No. 132, § 3; 2013, No. 133, § 3.

#### **5-18-105. Enhanced liability of an organization.**

In addition to any other statutorily authorized sentence or fine, an organization convicted of an offense under this chapter is subject to any combination of the following:

(1) A suspension or revocation of a license, permit, or prior approval granted to the organization by a state or local government agency;

(2) A court order to dissolve or reorganize; and

(3) Other relief as is equitable.

**History.** Acts 2013, No. 132, § 3; 2013, No. 133, § 3.

***SUBTITLE 3. OFFENSES INVOLVING FAMILIES,  
DEPENDENTS, ETC.***

**CHAPTER 26**

**OFFENSES INVOLVING THE FAMILY**

SUBCHAPTER.

3. DOMESTIC BATTERING AND ASSAULT.
4. NONSUPPORT.
5. CUSTODY AND VISITATION.

**SUBCHAPTER 3 — DOMESTIC BATTERING AND ASSAULT**

SECTION.

- 5-26-303. Domestic battering in the first degree.
- 5-26-304. Domestic battering in the second degree.
- 5-26-305. Domestic battering in the third degree.

SECTION.

- 5-26-306. Aggravated assault on a family or household member.
- 5-26-313. Notice.

**5-26-302. Definitions.**

**CASE NOTES**

ANALYSIS

Applicability.  
Dating Relationship.

**Applicability.**

Defendant cited neither argument nor convincing authority to show why an adulterous relationship did not come under the purview of a statute intended to curb domestic violence, where the legislature expressly included in subdivision (1)(A) of this section of a broad definition of “family or household member” to include “dating relationships” based on three factors, including “type;” defendant’s relationship with the victim was a romantic one that lasted several months, and it could be a romantic or intimate social relationship under subdivision (1)(A) of this section; the testimony was sufficient to show that defendant and the victim had numerous romantic and intimate interactions of various types for a sufficient length of time to support a finding that there was a “dating relationship” under the statute. Fuller v. State, 99 Ark. App. 264, 259 S.W.3d 486 (2007).

Defendant’s conviction for second-degree domestic battery by stabbing a family or household member, in violation of § 5-26-304(a)(2), was upheld where there was substantial evidence that the victim was a household member, as defined in subdivision (2)(F) of this section; defendant stated that defendant recognized the knife with which the victim was stabbed because defendant “lived there” and “used it, cooked with it, every day.” Delamar v. State, 101 Ark. App. 313, 276 S.W.3d 746 (2008).

**Dating Relationship.**

When defendant stabbed the victim after she arrived home to her apartment, the evidence was sufficient to support his conviction for domestic battery in the first degree in violation of § 5-26-303(a)(1); the trial court did not err by denying his motion for a directed verdict. The state did prove that he and the victim were involved in a “dating relationship” pursuant to subdivision (1)(A) of this section; they had been talking for several months, having sexual relations, and defendant constantly accused the victim of being with



other men. Webster v. State, 2009 Ark. App. 579, — S.W.3d — (2009).

### 5-26-303. Domestic battering in the first degree.

(a) A person commits domestic battering in the first degree if:

(1) With the purpose of causing serious physical injury to a family or household member, the person causes serious physical injury to a family or household member by means of a deadly weapon;

(2) With the purpose of seriously and permanently disfiguring a family or household member or of destroying, amputating, or permanently disabling a member or organ of a family or household member's body, the person causes such an injury to a family or household member;

(3) The person causes serious physical injury to a family or household member under circumstances manifesting extreme indifference to the value of human life;

(4) The person knowingly causes serious physical injury to a family or household member he or she knows to be sixty (60) years of age or older or twelve (12) years of age or younger; or

(5) The person:

(A) Commits any act of domestic battering as defined in § 5-26-304 or § 5-26-305; and

(B) For conduct that occurred within the ten (10) years preceding the commission of the current offense, the person has on two (2) previous occasions been convicted of any act of battery against a family or household member as defined by the laws of this state or by the equivalent laws of any other state or foreign jurisdiction.

(b)(1) Domestic battering in the first degree is a Class B felony.

(2) However, domestic battering in the first degree is a Class A felony upon a conviction under subsection (a) of this section if:

(A) Committed against a woman the person knew or should have known was pregnant; or

(B) The person committed one (1) or more of the following offenses within five (5) years of the offense of domestic battering in the first degree:

(i) Domestic battering in the first degree;

(ii) Domestic battering in the second degree, § 5-26-304;

(iii) Domestic battering in the third degree, § 5-26-305; or

(iv) A violation of an equivalent penal law of this state or of another state or foreign jurisdiction.

**History.** Acts 1979, No. 396, § 1; A.S.A. 1947, § 41-1653; Acts 1995, No. 1291, § 1; 1999, No. 1317, § 2; 1999, No. 1365, § 1; 2001, No. 1553, § 8; 2003, No. 944, § 1; 2003, No. 1079, § 1; 2005, No. 1994, § 481; 2007, No. 671, § 1; 2009, No. 194, § 1; 2009, No. 748, § 16; 2011, No. 1120, § 7; 2013, No. 417, § 1.

**A.C.R.C. Notes.** The amendment to

present subdivision (a)(5) of this section by Acts 2009, No. 748, § 16, is partially superseded by Acts 2009, No. 194, § 1, pursuant to Acts 2009, No. 748, § 45.

**Amendments.** The 2009 amendment by No. 194 inserted (a)(4), redesignated the following subdivision accordingly, and substituted "(a)(1)-(4)" for "(a)(1) - (a)(3)" in present (a)(5)(A).

The 2009 amendment by No. 748 subdivided present (a)(5), and made related and minor stylistic changes.

The 2011 amendment deleted “subdivisions (a)(1)–(4) of this section” following “as defined in” in (a)(5)(A).

The 2013 amendment rewrote the introductory language of (b)(2)(B); and added “A violation of” at the beginning of (b)(2)(B)(iv).

## CASE NOTES

### ANALYSIS

Evidence Sufficient.

Sentencing.

#### **Evidence Sufficient.**

Evidence was sufficient to show that defendant acted “under circumstances manifesting extreme indifference to the value of human life” and to sustain his conviction for first degree battery because defendant admittedly placed a child in a tub of water so hot that it severed the skin from his feet, and defendant’s own statements, although inconsistent, supported the conclusion that he knew that it was his responsibility to properly supervise the child during a bath and to ensure a safe water temperature and that he consciously disregarded the risks involved. *Bell v. State*, 99 Ark. App. 300, 259 S.W.3d 472 (2007).

When defendant stabbed the victim after she arrived home to her apartment, the evidence was sufficient to support his conviction for domestic battery in the first

degree in violation of subdivision (a)(1) of this section; the trial court did not err by denying his motion for a directed verdict. The state did prove that he and the victim were involved in a “dating relationship” pursuant to § 5-26-302(1)(A); they had been talking for several months, having sexual relations, and defendant constantly accused the victim of being with other men. *Webster v. State*, 2009 Ark. App. 579, — S.W.3d — (2009).

#### **Sentencing.**

Where defendant was convicted of multiple offenses and sentenced to 240 months for committing a terroristic act under § 5-13-310 and 192 months for domestic battery under subdivision (a)(3) of this section, the enhancement of his sentence on both charges by 144 months pursuant to § 16-90-120 did not result in his sentence being enhanced twice for using a deadly weapon because the use of a firearm was not an element the prosecution had to prove to obtain his convictions. *King v. State*, 2012 Ark. App. 94, — S.W.3d — (2012).

## **5-26-304. Domestic battering in the second degree.**

(a) A person commits domestic battering in the second degree if:

(1) With the purpose of causing physical injury to a family or household member, the person causes serious physical injury to a family or household member;

(2) With the purpose of causing physical injury to a family or household member, the person causes physical injury to a family or household member by means of a deadly weapon;

(3) The person recklessly causes serious physical injury to a family or household member by means of a deadly weapon; or

(4) The person knowingly causes physical injury to a family or household member he or she knows to be sixty (60) years of age or older or twelve (12) years of age or younger.

(b)(1) Domestic battering in the second degree is a Class C felony.

(2) However, domestic battering in the second degree is a Class B felony if:



(A) Committed against a woman the person knew or should have known was pregnant;

(B) The person committed one (1) or more of the following offenses within five (5) years of the offense of domestic battering in the second degree:

(i) Domestic battering in the first degree, § 5-26-303;

(ii) Domestic battering in the second degree;

(iii) Domestic battering in the third degree, § 5-26-305; or

(iv) A violation of an equivalent penal law of this state or of another state or foreign jurisdiction; or

(C) The person committed two (2) or more offenses of battery against a family or household member as defined by a law of this state or by an equivalent law of any other state or foreign jurisdiction within ten (10) years of the offense of domestic battering in the second degree.

**History.** Acts 1979, No. 396, § 2; A.S.A. 1947, § 41-1654; Acts 1995, No. 1291, § 2; 1999, No. 1365, § 2; 2001, No. 1553, § 9; 2003, No. 944, § 2; 2003, No. 1079, § 1; 2005, No. 1994, § 481; 2009, No. 194, § 2; 2013, No. 417, § 2.

**Amendments.** The 2009 amendment added (a)(4) and made related changes.

The 2013 amendment rewrote the introductory language of (b)(2)(B); added "A violation of" at the beginning of (b)(2)(B)(iv); and rewrote (b)(2)(C).

## CASE NOTES

### ANALYSIS

Evidence.  
Sentence.

### Evidence.

Defendant's conviction for second-degree domestic battery by stabbing a family or household member, in violation of subdivision (a)(2) of this section, was upheld where there was substantial evidence that the victim was a household member, as defined in § 5-26-302(2)(F); defendant stated that defendant recognized the knife with which the victim was stabbed because defendant "lived there" and "used it, cooked with it, every day." *Delamar v. State*, 101 Ark. App. 313, 276 S.W.3d 746 (2008).

When defendant's infant son was taken to the emergency room, the treating physician found that his broken femur was indicative of child abuse; the infant had fourteen broken rib bones in various stages of healing. Defendant admitted that he would sometimes get mad and squeeze his son; defendant was convicted of three counts of battery in the second degree in violation of this section and one count of battery in the first degree under

§ 5-13-201(a)(7). *Davis v. State*, 2009 Ark. App. 573, — S.W.3d — (2009).

Defendant's conviction for domestic battering under subdivision (a)(2) of this section was supported by sufficient evidence because the state showed that, with the purpose of causing physical injury, defendant caused injury to the victim, his brother, by means of a deadly weapon. While defendant contended that he was acting in self-defense when he struck the victim with a sickle, the testimony of the victim and the victim's brother established that the victim did not have the gun that he had when police arrived until after defendant had battered both the victim and the victim's brother. *Brown v. State*, 2011 Ark. App. 150, 381 S.W.3d 175 (2011).

Trial court did not err in revoking defendant's probation for two counts of possession of a controlled substance because the evidence was sufficient to show that he committed domestic battering, in violation of subdivision (a)(1) of this section; an officer testified that the victim's ear "was basically cut in half" and that the officer "could see the ligaments inside." *Mahomes v. State*, 2013 Ark. App. 215, — S.W.3d — (2013).

**Sentence.**

Trial court did not err in sentencing defendant after revoking his probation because defendant pleaded guilty to second-degree domestic battery, under this section, and third-degree domestic bat-

tery, under § 5-26-305, and his sentences of ten and six years, respectively, were sentences that could have been originally imposed for the offenses of which he was found guilty. *Jones v. State*, 2012 Ark. App. 69, 388 S.W.3d 503 (2012).

**5-26-305. Domestic battering in the third degree.**

(a) A person commits domestic battering in the third degree if:

(1) With the purpose of causing physical injury to a family or household member, the person causes physical injury to a family or household member;

(2) The person recklessly causes physical injury to a family or household member;

(3) The person negligently causes physical injury to a family or household member by means of a deadly weapon; or

(4) The person purposely causes stupor, unconsciousness, or physical or mental impairment or injury to a family or household member by administering to the family or household member, without the family or household member's consent, any drug or other substance.

(b)(1) Domestic battering in the third degree is a Class A misdemeanor.

(2) However, domestic battering in the third degree is a Class D felony if:

(A) Committed against a woman the person knew or should have known was pregnant;

(B) The person committed one (1) or more of the following offenses within five (5) years of the offense of domestic battering in the third degree:

(i) Domestic battering in the first degree, § 5-26-303;

(ii) Domestic battering in the second degree, § 5-26-304;

(iii) Domestic battering in the third degree;

(iv) Aggravated assault on a family or household member, § 5-26-306; or

(v) A violation of an equivalent penal law of this state or of another state or foreign jurisdiction; or

(C) The person committed two (2) or more offenses of battery against a family or household member as defined by a law of this state or by an equivalent law of any other state or foreign jurisdiction within ten (10) years of the offense of domestic battering in the second degree.

**History.** Acts 1979, No. 396, § 3; A.S.A. 1947, § 41-1655; Acts 1995, No. 1291, § 3; 1999, No. 1365, § 3; 2001, No. 1553, § 10; 2003, No. 944, § 3; 2003, No. 1079, § 1; 2005, No. 1994, § 481; 2009, No. 333, § 1; 2013, No. 417, § 3.

**Amendments.** The 2009 amendment,

in (b)(2)(B), inserted (b)(2)(B)(iv), redesignated the subsequent subdivision accordingly, and made related changes.

The 2013 amendment rewrote the introductory language of (b)(2)(B); added "A violation of" at the beginning of (b)(2)(B)(iv); and rewrote (b)(2)(C).



## CASE NOTES

## ANALYSIS

Evidence.

Force.

Sentence.

**Evidence.**

State produced evidence in the form of a witness that defendant pushed the victim from a moving vehicle and that he struck her afterwards as she lay on the ground; by pushing the victim from a moving vehicle and then kicking her, defendant consciously disregarded the risk that his actions would cause injury to the victim, and there was substantial evidence to support a finding that defendant recklessly caused physical injury to the victim. *Lasker v. State*, 2009 Ark. App. 591, — S.W.3d — (2009).

Defendant's suspended sentence was properly revoked under § 5-4-309(d) where the state proved that defendant committed third-degree domestic battery under subsection (a) of this section by showing that defendant inflicted physical injury under § 5-1-102(14), by pulling his wife's hair and throwing her against a vehicle. *Andrews v. State*, 2009 Ark. App. 624, — S.W.3d — (2009).

During a hearing on the state's petition to revoke a defendant's suspended sentence, defendant admitted that he slapped his pregnant wife and a responding officer testified to a personal observation of the wife's injuries; this evidence was sufficient to find that defendant inexcusably violated a condition of that suspension and that defendant had committed the offense of domestic battery in the third degree. *May v. State*, 2009 Ark. App. 703, — S.W.3d — (2009).

Pregnant wife's testimony that appellant pushed and threatened her — causing red marks on her neck and arm — was sufficient to prove by a preponderance that appellant violated the conditions of his suspended sentence by committing the criminal offenses of domestic battery in third degree, pursuant to subdivision (b)(2)(A) of this section, and terroristic threatening in the second degree, under § 5-13-301(b)(1). *Autrand v. State*, 2010 Ark. App. 245, — S.W.3d — (2010).

Because a juvenile's father had not resorted to use of a deadly weapon during an

argument, because there had been an interlude of approximately five minutes since their last confrontation, because the father, at the time he was struck, had turned away from the juvenile, and because the juvenile did not testify as to whether the juvenile's beliefs were reasonable, the juvenile lacked justification under §§ 5-1-102(18), 5-2-606(a)(1), 5-2-607(a)(1), (2), and was properly adjudicated as a delinquent for second-degree domestic battering. *D.W. v. State*, 2011 Ark. App. 187, — S.W.3d — (2011).

**Force.**

In a case alleging rape, kidnapping, and third-degree domestic battery, a sufficiency of the evidence argument was not preserved for review because defendant argued on the first time on appeal that the amount of restraint or force used did not warrant a kidnapping conviction and a third-degree battery conviction in addition to the rape. This was not the same argument raised during a directed verdict motion. *Rounsaville v. State*, 372 Ark. 252, 273 S.W.3d 486 (2008).

**Sentence.**

Revocation of defendant's suspended imposition of sentence for two felony convictions was appropriate because the circuit court's finding that she committed third-degree domestic battering and thus violated the condition that she break no laws, was not clearly against the preponderance of the evidence. The testimony was sufficient to prove that, either purposefully or recklessly, she struck her nephew and caused him physical injury in the form of substantial pain under subsection (a) of this section and § 5-1-102(14). *Westbrook v. State*, 2011 Ark. App. 615, — S.W.3d — (2011).

Trial court did not err in sentencing defendant after revoking his probation because defendant pleaded guilty to second-degree domestic battery, § 5-26-304, and third-degree domestic battery, under this section, and his sentences of ten and six years, respectively, were sentences that could have been originally imposed for the offenses of which he was found guilty. *Jones v. State*, 2012 Ark. App. 69, 388 S.W.3d 503 (2012).

**5-26-306. Aggravated assault on a family or household member.**

(a) A person commits aggravated assault on a family or household member if, under circumstances manifesting extreme indifference to the value of human life, the person purposely:

(1) Engages in conduct that creates a substantial danger of death or serious physical injury to a family or household member;

(2) Displays a firearm in a manner that creates a substantial danger of death or serious physical injury to a family or household member; or

(3) Impedes or prevents the respiration of a family or household member or the circulation of a family or household member's blood by applying pressure on the throat or neck or by blocking the nose or mouth of a family or household member.

(b) Aggravated assault on a family or household member is a Class D felony.

**History.** Acts 1979, No. 396, § 4; A.S.A. 1947, § 41-1656; Acts 1995, No. 1291, § 4; 2013, No. 418, § 1.

**Amendments.** The 2013 amendment rewrote (a).

**CASE NOTES****Evidence.**

Evidence was sufficient to sustain defendant's conviction for aggravated assault and aggravated assault on a family member when, among other things, evidence showed that defendant drove a car in an attempt to run over the victim, the father of her child, and his girlfriend. *Williams v. State*, 96 Ark. App. 277, 241 S.W.3d 290 (2006).

Evidence was sufficient to convict defen-

dant of aggravated assault on a family or household member because a dispatcher testified that the dispatcher received a 911 call from defendant's wife reporting a domestic disturbance; a deputy testified that the deputy noticed bruising on the wife's body and saw broken dishes and cabinets knocked off the walls. *Mathis v. State*, 2012 Ark. App. 285, — S.W.3d — (2012).

**5-26-313. Notice.**

A person who is convicted of any misdemeanor of domestic violence shall be notified by the court that it is unlawful for the person to ship, transport, or possess a firearm or ammunition pursuant to 18 U.S.C. § 922(g)(8) and (9), as it existed on January 1, 2007.

**History.** Acts 2007, No. 676, § 1.

**SUBCHAPTER 4 — NONSUPPORT****SECTION.**

5-26-401. Nonsupport.

5-26-415. Times when periodic payments may be authorized.



**5-26-401. Nonsupport.**

(a) A person commits the offense of nonsupport if he or she fails to provide support to the person's:

(1) Spouse who is physically or mentally infirm or financially dependent;

(2) Legitimate child who is less than eighteen (18) years of age;

(3) Illegitimate child who is less than eighteen (18) years of age and whose parentage has been determined in a previous judicial proceeding; or

(4) Dependent child who is physically or mentally infirm.

(b)(1) Nonsupport is a Class A misdemeanor.

(2) However, nonsupport is a:

(A) Class D felony if the person:

(i) Leaves or remains outside the State of Arkansas for more than thirty (30) days while a current duty of support is unpaid. However, it is an affirmative defense to a charge under this subdivision (b)(2)(A)(i) that the defendant did not leave or remain outside the state with the purpose of avoiding the payment of support;

(ii) Has previously been convicted of nonsupport; or

(iii) Owes more than two thousand five hundred dollars (\$2,500) in past-due child support, pursuant to a court order or by operation of law, and the amount represents at least four (4) months of past-due child support;

(B) Class C felony if the person owes more than ten thousand dollars (\$10,000) but less than twenty-five thousand dollars (\$25,000) in past-due child support, pursuant to a court order or by operation of law; or

(C) Class B felony if the person owes more than twenty-five thousand dollars (\$25,000) in past-due child support, pursuant to a court order or by operation of law.

(c) The court may direct that a fine imposed upon conviction of nonsupport or a bond forfeited in connection with a prosecution for nonsupport be paid for the support and maintenance of the person entitled to support.

(d) A district court located in a county having a population in excess of two hundred thousand (200,000) inhabitants shall cause a warrant of arrest to be issued upon affidavit of a spouse or any person who is responsible for maintenance of a dependent child that states that nonsupport has taken place.

(e) Any person found guilty of nonsupport is also responsible for the court costs and administrative costs incurred by the court.

(f) The state may take judgment against any defendant convicted of nonsupport for any money expended by any state agency for the support and maintenance of the person with respect to whom the defendant had a duty to support.

(g) It is an affirmative defense to a prosecution under this section that the defendant had just cause to fail to provide the support.

**History.** Acts 1975, No. 280, § 2405; 2405; Acts 1997, No. 1282, § 1; 1999, No. 1983, No. 174, § 1; A.S.A. 1947, § 41-1484, § 1; 2007, No. 827, § 31.

### CASE NOTES

#### ANALYSIS

Continuing Crime.  
Double Jeopardy.  
Evidence.  
Proof.

#### Continuing Crime.

Trial court erred in denying a father's motion to dismiss a charge of failure to pay child support, a continuing offense, on the ground that the statute of limitations had expired because the date of the crime of nonsupport had to be determined based upon subdivision (b)(3) of this section, prior to its amendment in 1997; the one-year statute of limitations expired several weeks prior to the effective date of the amended version of the statute. *Reeves v. State*, 374 Ark. 415, 288 S.W.3d 577 (2008).

#### Double Jeopardy.

Defendant's prior contempt proceedings did not present a double-jeopardy bar to the state's prosecution for criminal nonsupport under this section because each time defendant failed to pay his child support, he offended his ongoing duty to provide support; the state was not seeking to punish defendant for the acts of nonpayment for which he had already been punished, but rather, the state was attempting to penalize defendant for a violation of the statute for which he had not

yet been punished. *Halpaine v. State*, 2011 Ark. 517, 385 S.W.3d 838 (2011).

#### Evidence.

Trial court properly revoked defendant's suspended sentence for nonsupport, in violation of subdivision (a)(3) of this section, because defendant's purported lack of knowledge and understanding of the obligation was inconsistent with what defendant was told and what defendant admitted during the process of pleading guilty; substantial evidence supported the revocation order. *Rhoades v. State*, 2010 Ark. App. 730, 379 S.W.3d 659 (2010).

#### Proof.

Trial court erred in revoking defendant's probation for failure to pay a child support arrearage following a conviction for felony nonsupport in violation of subsection (a) and subdivision (b)(2)(B) of this section where defendant asserted an inability to pay and offered a disability as a reasonable excuse for his nonpayment and where the state offered no evidence of defendant's other sources of income, his assets, or his expenses. The trial court should have applied § 5-4-309(d)'s general inexcusably failed to comply standard as refined by § 5-4-205(f)'s restitution-specific factors. *Hanna v. Arkansas*, 2009 Ark. App. 809, — S.W.3d — (2009), review denied, *Hanna v. State*, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 93 (Feb. 12, 2010).

### 5-26-415. Times when periodic payments may be authorized.

The original trial court may issue the order provided in § 5-26-414:

- (1) Before the trial, with the consent of the defendant;
- (2) At the trial, on entry of plea of guilty; or
- (3) After conviction, in lieu of a penalty provided in § 5-26-401 or in addition to a penalty provided in § 5-26-401.

**History.** Acts 1951, No. 67, § 8; 1953, No. 242, § 8; A.S.A. 1947, § 41-2455; Acts 2007, No. 827, § 32.



**SUBCHAPTER 5 — CUSTODY AND VISITATION****SECTION.**

5-26-501. Interference with visitation.

5-26-503. Interference with custody.

**5-26-501. Interference with visitation.**

(a)(1) A person commits the offense of interference with visitation if, knowing that he or she has no lawful right to do so, he or she takes, entices, or keeps any minor from any person entitled by a court decree or order to the right of visitation with the minor.

(2) A person claiming interference with visitation shall provide a copy of the signed court order or decree regarding custody or visitation rights to a law enforcement officer as proof of the interference with visitation.

(b)(1) Interference with visitation is a Class C misdemeanor.

(2) However, interference with visitation is a:

(A) Class D felony for any offense if the minor is taken, enticed, or kept outside of the State of Arkansas; or

(B) Class A misdemeanor for a third or subsequent offense.

(c) It is an affirmative defense to a prosecution that:

(1) A person or lawful guardian committed the act to protect the minor from imminent physical harm if the defendant's:

(A) Belief that physical harm was imminent is reasonable; and

(B) Conduct in withholding visitation rights was a reasonable response to the harm believed to be imminent;

(2) A person or lawful guardian committed the act based on a reasonable belief that the person entitled to visitation would remove the minor from the jurisdiction of the court;

(3) The act was committed with the mutual consent of all parties having a right to custody and visitation of the minor; or

(4) The act was otherwise authorized by law.

**History.** Acts 1985, No. 540, § 1; A.S.A. 1947, § 41-2415; Acts 1999, No. 1129, § 1; 2007, No. 827, § 33.

**CASE NOTES****Contempt.**

Permanent restraining order, which authorized law-enforcement officers to arrest and incarcerate a mother for actions far beyond the statutory offense of interference with visitation, under this section,

was an impermissible delegation of the circuit court's judicial power, under Ark. Const., Art. 7, § 26, to enforce its orders by finding the mother in contempt, under § 16-10-108. *Brock v. Eubanks*, 102 Ark. App. 165, 288 S.W.3d 272 (2008).

**5-26-503. Interference with custody.**

(a) A person commits the offense of interference with custody if without lawful authority he or she knowingly takes, entices, or keeps,

or aids, abets, hires, or otherwise procures another person to take, entice, or keep any minor from the custody of:

(1) The parent of the minor including an unmarried woman having legal custody of an illegitimate child under § 9-10-113;

(2) The guardian of the minor;

(3) A public agency having lawful charge of the minor; or

(4) Any other lawful custodian.

(b) Interference with custody is a Class C felony.

(c)(1) In every case prior to serving a warrant for arrest on a person charged with the offense of interference with custody, the police officer or other law enforcement officer shall inform the Department of Human Services of the circumstances of any minor named in the information or indictment as having been taken, enticed, or kept from the parent, guardian, or custodian in a manner constituting interference with custody.

(2) A representative of the department shall be present with the arresting police officer or law enforcement officer to take the minor into temporary custody of the department pending further proceedings by a court of competent jurisdiction.

(d)(1) A court of competent jurisdiction shall determine the immediate custodial placement of any minor taken into custody by the department under subsection (c) of this section pursuant to a petition brought by the department to determine if there is probable cause to believe the minor may be:

(A) Removed from the jurisdiction of the court;

(B) Abandoned; or

(C) Outside the immediate care or supervision of a person lawfully entitled to custody.

(2) The court shall immediately give custody to the lawful custodian if it finds that the lawful custodian is present before the court.

(e)(1) The department shall comply with the requirements of § 9-27-312 with regard to the giving of a notice and the setting of a hearing on a petition filed under subsection (d) of this section.

(2) The department is immune from liability with respect to any conduct undertaken pursuant to this section unless it is determined that the department acted with actual malice.

**History.** Acts 2007, No. 669, § 1; 2011, inserted “or keeps” and “or keep” in the introductory language of (a).  
No. 1177, § 1.

**Amendments.** The 2011 amendment

## CHAPTER 27

### OFFENSES AGAINST CHILDREN OR INCOMPETENTS

#### SUBCHAPTER.

2. OFFENSES GENERALLY.

3. ARKANSAS PROTECTION OF CHILDREN AGAINST EXPLOITATION ACT OF 1979.

4. USE OF CHILDREN IN SEXUAL PERFORMANCES.

5. FRAUDULENT IDENTIFICATION DOCUMENTS FOR MINORS.



## SUBCHAPTER

## 6. COMPUTER CRIMES AGAINST MINORS.

**SUBCHAPTER 2 — OFFENSES GENERALLY**

## SECTION.

5-27-222. Neglect of minor resulting in delinquency.

5-27-227. Providing minors with tobacco products and cigarette papers — Purchase, use, or possession prohibited — Self-service displays prohibited — Placement of tobacco vending machines.

## SECTION.

5-27-233. Providing minors with e-cigarettes and e-cigarette products prohibited — Purchase, use, or possession prohibited — Self-service displays and vending machines prohibited.

**5-27-205. Endangering the welfare of a minor in the first degree.****CASE NOTES****Illustrative Cases.**

Judgment convicting defendant of manufacturing methamphetamine under § 5-64-401(a)(1), possession of drug paraphernalia with the intent to manufacture methamphetamine under § 5-64-403, first-degree endangering the welfare of a minor under subdivision (a)(1) of this section, manufacturing methamphetamine in the presence of a minor, and manufacturing methamphetamine near certain facilities was affirmed because contraband was found in the kitchen and bedroom of defendant's residence, strewn about his yard, and in an outbuilding behind his residence; the materials found in the search were the components of a methamphetamine lab; at least two of defendant's minor children were present in the residence at the time of the search; and the drug paraphernalia and chemicals found could easily be accessed by the children. *Morgan v. State*, 2009 Ark. 257, 308 S.W.3d 147 (2009).

Evidence that the burns to defendant's daughter were caused by a hot instrument, not hot water, which produced the risk of protracted disfigurement was sufficient to satisfy this section, the child endangerment statute. *McKnight v. State*, 2010 Ark. App. 598, 378 S.W.3d 173 (2010).

Defendant's conviction for endangering the welfare of a minor under this section was appropriate because the evidence was sufficient. Defendant fired a shotgun at the child's grandmother as the mother of defendant's child and the child stood approximately one foot away from the victim behind a screen door on the front porch; according to the mother's testimony, defendant dragged her by the hair to the car while she held the infant, and once at the case, defendant then beat the mother. *Williams v. State*, 2011 Ark. 432, 385 S.W.3d 157 (2011).

**5-27-206. Endangering the welfare of a minor in the second degree.****CASE NOTES****Evidence Sufficient.**

Evidence was sufficient to sustain convictions for endangering the welfare of a minor because defendant admitted that he forced one child to perform oral sex on him while the other child sat in the back

seat, and in his statement to police officers, defendant indicated that he was aware of what he was doing and that the child was in the back seat. *Bell v. State*, 371 Ark. 375, 266 S.W.3d 696 (2007).

Trial court did not err in refusing to

direct the verdicts where defendant took actions to conceal the harm to the child, and failed to take action to secure appropriate care for the child; the jury could conclude that defendant rubbing a substance known to cause skin irritation on

the face of a toddler where Superglue had already adhered would cause, at the very least, the impairment of physical condition or a visible mark associated with the physical trauma. *Price v. State*, 2009 Ark. App. 664, 344 S.W.3d 678 (2009).

### **5-27-210. Parental responsibility for student's firearm possession.**

#### **RESEARCH REFERENCES**

**ALR.** Validity of Parental Responsibility Statutes and Ordinances Holding Par-

ents Liable for Criminal Acts of Their Children. 74 A.L.R.6th 181.

### **5-27-221. Permitting abuse of a minor.**

#### **CASE NOTES**

##### **Evidence.**

Appellate court affirmed defendant's conviction under this section as there was evidence that defendant knew her son was being abused by her husband and she did nothing to prevent it. *Graham v. State*, 365 Ark. 274, 229 S.W.3d 30 (2006).

Defendant's conviction for permitting the abuse of her 23-month-old child by her boyfriend, in violation of subsection (a) of

this section, was supported by the evidence because the medical evidence established that the child was covered with visible scars and older injuries that would have been apparent to a care giver; an older child testified to telling defendant of earlier instances of abuse, and defendant's only response was to deny the abuse. *Sullivan v. State*, 2012 Ark. 74, 386 S.W.3d 507 (2012).

### **5-27-222. Neglect of minor resulting in delinquency.**

(a) It is unlawful for a parent or person standing in loco parentis to a minor to grossly neglect a parental duty to the minor if the gross neglect:

- (1) Proximately results in the delinquency of the minor; or
- (2) Fails to correct the delinquency of the minor.

(b) Upon conviction, a person who violates this section is guilty of a violation and shall be punished by a fine not to exceed two hundred fifty dollars (\$250).

**History.** Acts 1963, No. 109, § 1; A.S.A. 1947, § 41-2471; Acts 2005, No. 1994, § 44; 2007, No. 827, § 34.

### **5-27-227. Providing minors with tobacco products and cigarette papers — Purchase, use, or possession prohibited — Self-service displays prohibited — Placement of tobacco vending machines.**

- (a)(1) It is unlawful for any person to give, barter, or sell to a minor:
  - (A) Tobacco in any form; or
  - (B) A cigarette paper.



(2) A person who pleads guilty or nolo contendere to or is found guilty of violating subdivision (a)(1) of this section is guilty of a violation and is subject to a fine not to exceed one hundred dollars (\$100) per violation.

(3) An employee of an Arkansas Retail Cigarette and Tobacco permit holder who violates subdivision (a)(1) of this section is subject to a fine not to exceed one hundred dollars (\$100) per violation.

(b)(1) It is unlawful for a minor to:

(A) Use or possess or to purchase, or attempt to purchase:

(i) Tobacco in any form; or

(ii) Cigarette papers; or

(B) For the purpose of obtaining or attempting to obtain tobacco in any form or cigarette papers, falsely represent himself or herself to be eighteen (18) years of age or older by displaying proof of age that is false, fraudulent, or not actually proof of the minor's age.

(2) Any cigarettes, tobacco products, or cigarette papers found in the possession of a minor may be confiscated and destroyed by a law enforcement officer.

(c)(1) It is not an offense under subsection (b) of this section if:

(A) The minor was acting at the direction of an authorized agent of the Arkansas Tobacco Control Board to enforce or ensure compliance with laws relating to the prohibition of the sale of tobacco in any form or cigarette papers to minors;

(B) The minor was acting at the direction of an authorized agent of the Division of Behavioral Health Services to compile statistical data relating to the sale of tobacco in any form or cigarette papers to minors;

(C) The minor was acting at the request of an Arkansas Retail Cigarette and Tobacco permit holder to assist the permit holder by performing a check on the permit holder's own retail business to see if the permit holder's employees would sell tobacco or cigarette papers to the minor; or

(D) The minor was acting as an agent of a retail permit holder within the scope of employment.

(2) A minor performing activities under subdivision (c)(1) of this section shall:

(A) Display the appearance of a minor;

(B) Have the written consent of the minor's parent or guardian to perform the activity on file with the agency utilizing the minor; and

(C)(i) Present a true and correct identification if asked.

(ii) Any failure on the part of a minor to provide true and correct identification upon request is a defense to any action under this section or a civil action under § 26-57-256.

(d) Any person who sells tobacco in any form or a cigarette paper has the right to deny the sale of any tobacco in any form or a cigarette paper to any person.

(e) It is unlawful for any person who has been issued a permit or a license under the Arkansas Tobacco Products Tax Act of 1977, § 26-57-

201 et seq., to fail to display in a conspicuous place or on each vending machine a sign indicating that the sale of tobacco products to or purchase or possession of tobacco products by a minor is prohibited by law.

(f) It is unlawful for any manufacturer whose tobacco product is distributed in this state and any person who has been issued a permit or license under the Arkansas Tobacco Products Tax Act of 1977, § 26-57-201 et seq., to distribute a free sample of any tobacco product or coupon that entitles the holder of the coupon to any free sample of any tobacco product:

(1) In or on any public street or sidewalk within five hundred feet (500') of any playground, public school, or other facility when the playground, public school, or other facility is being used primarily by minors for recreational, educational, or other purposes; or

(2) To any minor.

(g)(1)(A) It is unlawful for any person that has been issued a permit or license under the Arkansas Tobacco Products Act of 1977, § 26-57-201 et seq., to sell or distribute a cigarette product through a self-service display.

(B) Subdivision (g)(1)(A) of this section does not apply to a:

(i) Vending machine that complies with subdivision (h)(1)(A) of this section; or

(ii) Retail tobacco store.

(2) As used in subdivision (g)(1) of this section:

(A) "Retail tobacco store" means a retail store utilized primarily for the sale of tobacco products and accessories and in which the sale of other products is merely incidental; and

(B) "Self-service display" means a display:

(i) That contains a cigarette product;

(ii) That is located in an area where customers are permitted; and

(iii) In which the cigarette product is readily accessible to a customer without the assistance of a salesperson.

(h)(1)(A) Except as provided in subdivision (h)(2) of this section, it is unlawful for any person who owns or leases a tobacco vending machine to place a tobacco vending machine in a public place.

(B) As used in subdivision (h)(1)(A) of this section, "public place" means a publicly or privately owned place to which the public or a substantial number of people have access.

(2) A tobacco vending machine may be placed in a:

(A) Restricted area within a factory, business, office, or other structure to which a member of the general public is not given access;

(B) Permitted premises that has a permit for the sale or dispensing of an alcoholic beverage for on-premises consumption that restrict entry to a person twenty-one (21) years of age or older; or

(C) Place where the tobacco vending machine is under the supervision of the owner or an employee of the owner.

(i) Any retail permit holder or license holder who violates any provision in this section is deemed guilty of a violation and subject to penalties under § 26-57-256.



(j)(1) A notice of alleged violation of this section shall be given to the holder of a retail permit or license or an agent of the holder within ten (10) days of the alleged violation.

(2)(A) The notice shall contain the date and time of the alleged violation.

(B)(i) The notice shall also include either the name of the person making the alleged sale or information reasonably necessary to determine the location in the store that allegedly made the sale.

(ii) When appropriate, information under subdivision (j)(2)(B)(i) of this section should include, but not be limited to, the:

(a) Cash register number;

(b) Physical location of the sale in the store; and

(c) If possible, the lane or aisle number.

(k) Notwithstanding the provisions of subsection (i) of this section, the court shall consider the following factors when reviewing a possible violation:

(1) The business has adopted and enforced a written policy against selling cigarettes or tobacco products to minors;

(2) The business has informed its employees of the applicable laws regarding the sale of cigarettes and tobacco products to minors;

(3) The business has required employees to verify the age of a cigarette or tobacco product customer by way of photographic identification;

(4) The business has established and imposed disciplinary sanctions for noncompliance; and

(5) That the appearance of the purchaser of the tobacco in any form or cigarette papers was such that an ordinary prudent person would believe him or her to be of legal age to make the purchase.

(l) A person convicted of violating any provision of this section whose permit or license to distribute or sell a tobacco product is suspended or revoked upon conviction shall surrender to the court any permit or license to distribute or sell a tobacco product and the court shall transmit the permit or license to distribute or sell a tobacco product to the Director of the Department of Finance and Administration and instruct the Director of Arkansas Tobacco Control:

(1) To suspend or revoke the person's permit or license to distribute or sell a tobacco product and to not renew the permit or license; and

(2) Not to issue any new permit or license to that person for the period of time determined by the court in accordance with this section.

**History.** Acts 1929, No. 152, § 26; Pope's Dig., § 13557; A.S.A. 1947, § 41-2465; Acts 1991, No. 543, § 1; 1997, No. 1337, § 24; 1999, No. 1591, §§ 1, 3; 2003, No. 846, § 1; 2007, No. 165, § 1; 2009, No. 748, § 17; 2009, No. 785, § 6; 2013, No. 1107, § 1.

**A.C.R.C. Notes.** The repeal of this section and the creation of a new subchapter § 5-27-701 et seq. by Acts 2009, No. 748,

§§ 17 and 19, is superseded by the amendment to § 5-27-227 by Acts 2009, No. 785, § 6, pursuant to Acts 2009, No. 748, §45, and § 1-2-207(b).

**Amendments.** The 2009 amendment by No. 785 rewrote the section.

The 2013 amendment substituted "Division of Behavioral Health Services" for "Office of Alcohol and Drug Abuse Prevention" in (c)(1)(B).

**RESEARCH REFERENCES**

**ALR.** Validity, Construction, and Application of State and Local Laws Providing for Civil Liability for Tobacco Sales or Distribution to Minors. 66 A.L.R.6th 315.

**5-27-230. Exposing a child to a chemical substance or methamphetamine.****CASE NOTES****Evidence.**

Substantial evidence demonstrated that defendant's children had been exposed to the chemicals used in the manufacture of methamphetamine, and there was sufficient evidence to support defendant's conviction of manufacturing meth-

amphetamine; thus, defendant intended to manufacture methamphetamine and knowingly permitted her children to be exposed to methamphetamine. *Holt v. State*, 2009 Ark. 482, 348 S.W.3d 562 (2009).

**5-27-233. Providing minors with e-cigarettes and e-cigarette products prohibited — Purchase, use, or possession prohibited — Self-service displays and vending machines prohibited.**

(a) As used in this section:

(1) "E-cigarette" means an electronic oral device that provides a vapor of nicotine or another substance that, when used or inhaled, simulates smoking, including without limitation a device that:

(A) Is composed of a heating element, battery, electronic circuit, or a combination of heating element, battery, or electronic circuit;

(B) Works in combination with a liquid nicotine delivery device composed either, in whole or in part, of pure nicotine and manufactured for use with e-cigarettes; and

(C) Is manufactured, distributed, marketed, or sold as an e-cigarette, e-cigar, e-pipe, or under any other product name or descriptor; and

(2) "Self-service display or vending machine" means a display or vending machine:

(A) That contains e-cigarettes or e-cigarette products;

(B) That is located in an area where customers are permitted; and

(C) In which e-cigarettes or e-cigarette products are readily accessible to a customer without the assistance of a salesperson.

(b)(1) It is unlawful for a person or business to give, barter, or sell to a minor:

(A) An e-cigarette; or

(B) An e-cigarette product.

(2) A business owner who pleads guilty or nolo contendere to or is found guilty of violating subdivision (b)(1) of this section is guilty of a violation and is subject to a fine not to exceed one hundred dollars (\$100) per violation.



(3) An employee of a business who violates subdivision (b)(1) of this section is subject to a fine not to exceed one hundred dollars (\$100) per violation.

(c)(1) It is unlawful for a minor to:

(A) Use or possess or to purchase or attempt to purchase:

(i) An e-cigarette; or

(ii) An e-cigarette product; or

(B) For the purpose of obtaining or attempting to obtain e-cigarettes or e-cigarette products, falsely represent himself or herself to be eighteen (18) years of age or older by displaying proof of age that is false, fraudulent, or not actually proof of the minor's age.

(2) An e-cigarette or e-cigarette product found in the possession of a minor may be confiscated and destroyed by a law enforcement officer.

(d) It is not an offense under subsection (c) of this section if the minor was acting as an agent of a business within the scope of employment.

(e) A person or business that sells e-cigarettes or e-cigarette products has the right to deny the sale of e-cigarettes or e-cigarette products to any person.

(f) It is unlawful for a business to fail to display in a conspicuous place or on each vending machine a sign indicating that the sale of e-cigarettes or e-cigarette products to or purchase or possession of e-cigarettes or e-cigarette products by a minor is prohibited by law.

(g) It is unlawful for a manufacturer to distribute a free sample of an e-cigarette or e-cigarette product or a coupon that entitles the holder of the coupon to a free sample of an e-cigarette or e-cigarette product:

(1) In or on a public street or sidewalk within five hundred feet (500') of a playground, public school, or other facility when the playground, public school, or other facility is being used primarily by minors for recreational, educational, or other purposes; or

(2) To a minor.

(h) It is unlawful for a person or business to sell or distribute e-cigarettes or e-cigarette products through a self-service display or vending machine that is accessible to minors.

(i) A court shall consider the following factors when reviewing a possible violation of this section:

(1) The business has adopted and enforced a written policy against selling e-cigarettes or e-cigarette products to minors;

(2) The business has informed its employees of the applicable laws regarding the sale of e-cigarettes or e-cigarette products to minors;

(3) The business has required employees to verify the age of an e-cigarette or e-cigarette products customer by way of photographic identification;

(4) The business has established and imposed disciplinary sanctions for noncompliance; and

(5) That the appearance of the purchaser of the e-cigarettes or e-cigarette products was such that an ordinary prudent person would believe him or her to be of legal age to make the purchase.

**History.** Acts 2013, No. 1451, § [1].

### SUBCHAPTER 3 — ARKANSAS PROTECTION OF CHILDREN AGAINST EXPLOITATION ACT OF 1979

#### SECTION.

5-27-302. Definitions.

5-27-303. Engaging children in sexually explicit conduct for use in visual or print medium.

#### SECTION.

5-27-305. Transportation of minors for prohibited sexual conduct.

5-27-306. Internet stalking of a child.

5-27-307. Sexually grooming a child.

**Effective Dates.** Acts 2007, No. 38, § 3: Jan. 30, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the current penalty classification for the offense of indecent exposure is not adequate to protect the children in this state from repeat offenders; that the Internet is being used as a tool by people that are attempting to sexually victimize children in the State of Arkansas; that the current penalty classification for the offense of Internet stalking of a child in certain situations is not adequate to protect the children in this state; and that

this act is immediately necessary because of the public risk posed by sexual predators. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

#### 5-27-302. Definitions.

As used in this subchapter:

- (1) "Child" means any person under eighteen (18) years of age;
- (2) "Commercial exploitation" means having monetary or other material gain as a direct or indirect goal;
- (3) "Producing" means producing, directing, manufacturing, issuing, publishing, or advertising;
- (4) "Sexually explicit conduct" means actual or simulated:
  - (A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
  - (B) Bestiality;
  - (C) Masturbation;
  - (D) Sadomasochistic abuse for the purpose of sexual stimulation;
 or
  - (E) Lewd exhibition of:
    - (i) The genitals or pubic area of any person; or
    - (ii) The breast of a female; and
- (5) "Visual or print medium" means any film, photograph, negative, slide, book, magazine, magnetic image, electronic image, or other visual or print medium other than material specifically used by a licensed



medical professional or mental health professional, or both, for the purpose of assessment, evaluation, and treatment of a sex offender.

**History.** Acts 1979, No. 499, § 2; A.S.A. 1947, § 41-4202; Acts 1995, No. 1209, § 1; 2007, No. 827, § 35; 2011, No. 1190, § 1; 2013, No. 1114, § 1.

**Amendments.** The 2011 amendment substituted “eighteen (18)” for “seventeen (17)” in (1).

**5-27-303. Engaging children in sexually explicit conduct for use in visual or print medium.**

(a) Any person eighteen (18) years of age or older who employs, uses, persuades, induces, entices, or coerces any child to engage in or who has a child assist any other person to engage in any sexually explicit conduct for the purpose of producing any visual or print medium depicting the sexually explicit conduct is guilty of a:

- (1) Class B felony for the first offense; and
- (2) Class A felony for a subsequent offense.

(b) Any parent, legal guardian, or person having custody or control of a child who knowingly permits the child to engage in or to assist any other person to engage in sexually explicit conduct for the purpose of producing any visual or print medium depicting the sexually explicit conduct is guilty of a:

- (1) Class B felony for the first offense; and
- (2) Class A felony for a subsequent offense.

**History.** Acts 1979, No. 499, § 3; A.S.A. 1947, § 41-4203; Acts 2003, No. 1087, § 1; 2013, No. 1086, § 3.

**Amendments.** The 2013 amendment inserted “eighteen (18) years of age or older” in (a).

**CASE NOTES**

**ANALYSIS**

**Evidence.**  
Producing.

**Evidence.**

Trial court did not err in permitting the state to introduce videotapes depicting defendant engaged in sexual acts with his victims and with each other because the video footage was relevant to proving the elements of both the charges of rape and the charges of engaging children in the production of child pornography and because it could not be said that the video served no valid purpose other than to inflame the passions of the jury. *Williams v. State*, 374 Ark. 282, 287 S.W.3d 559 (2008), rehearing denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 589 (Oct. 30, 2008).

Where defendant was charged with numerous counts of rape and engaging children in the production of child pornography, the probative value of a DVD depicting defendant engaged in sexual contact with the young boys was not substantially outweighed by the danger of unfair prejudice because the state had the burden of proving the elements of all of the charges against defendant and because the state was entitled to prove the elements of the charges with its best evidence and the videos were certainly the state’s best evidence. *Williams v. State*, 374 Ark. 282, 287 S.W.3d 559 (2008), rehearing denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 589 (Oct. 30, 2008).

**Producing.**

Where defendant was convicted of engaging children in sexually explicit conduct for use in visual or print medium,

counsel was not ineffective for failing to make an argument that defendant was not producing materials for “pecuniary profit” as that was no longer a required element of the charge against defendant.

Smith v. State, 367 Ark. 611, 242 S.W.3d 253 (2006), rehearing denied, — Ark. —, — S.W.3d —, 2006 Ark. LEXIS 629 (Dec. 14, 2006).

### **5-27-305. Transportation of minors for prohibited sexual conduct.**

(a) A person commits the offense of transportation of a minor for prohibited sexual conduct if the person transports, finances in whole or part the transportation of, or otherwise causes or facilitates the movement of any minor, and the actor:

(1) Knows or has reason to know that prostitution or sexually explicit conduct involving the minor will be commercially exploited by any person; and

(2) Acts with the purpose that the minor will engage in:

(A) Prostitution; or

(B) Sexually explicit conduct.

(b) Transportation of a minor for prohibited sexual conduct is a Class A felony.

**History.** Acts 1979, No. 499, § 5; A.S.A. 1947, § 41-4205; Acts 2007, No. 248, § 1; 2009, No. 748, § 18.

**Amendments.** The 2009 amendment redesignated the introductory language as (a) and substituted “A person commits

the offense of transportation of a minor for prohibited sexual conduct if the person” for “Any person is guilty of a Class A felony who”; added (b); and made minor stylistic changes.

### **5-27-306. Internet stalking of a child.**

(a) A person commits the offense of internet stalking of a child if the person being twenty-one (21) years of age or older knowingly uses a computer online service, internet service, or local internet bulletin board service to:

(1) Seduce, solicit, lure, or entice a child fifteen (15) years of age or younger in an effort to arrange a meeting with the child for the purpose of engaging in:

(A) Sexual intercourse;

(B) Sexually explicit conduct; or

(C) Deviate sexual activity;

(2) Seduce, solicit, lure, or entice an individual that the person believes to be fifteen (15) years of age or younger in an effort to arrange a meeting with the individual for the purpose of engaging in:

(A) Sexual intercourse;

(B) Sexually explicit conduct; or

(C) Deviate sexual activity;

(3) Compile, transmit, publish, reproduce, buy, sell, receive, exchange, or disseminate the name, telephone number, electronic mail address, residence address, picture, physical description, characteristics, or any other identifying information on a child fifteen (15) years of



age or younger in furtherance of an effort to arrange a meeting with the child for the purpose of engaging in:

- (A) Sexual intercourse;
- (B) Sexually explicit conduct; or
- (C) Deviate sexual activity;

(4) Compile, transmit, publish, reproduce, buy, sell, receive, exchange, or disseminate the name, telephone number, electronic mail address, residence address, picture, physical description, characteristics, or any other identifying information on an individual that the person believes to be fifteen (15) years of age or younger in furtherance of an effort to arrange a meeting with the individual for the purpose of engaging in:

- (A) Sexual intercourse;
- (B) Sexually explicit conduct; or
- (C) Deviate sexual activity.

(b) Internet stalking of a child is a:

(1) Class B felony if the person attempts to arrange a meeting with a child fifteen (15) years of age or younger, even if a meeting with the child never takes place;

(2) Class B felony if the person attempts to arrange a meeting with an individual that the person believes to be fifteen (15) years of age or younger, even if a meeting with the individual never takes place; or

(3) Class A felony if the person arranges a meeting with a child fifteen (15) years of age or younger and an actual meeting with the child takes place, even if the person fails to engage the child in:

- (A) Sexual intercourse;
- (B) Sexually explicit conduct; or
- (C) Deviate sexual activity.

(c) This section does not apply to a person or entity providing an electronic communications service to the public that is used by another person to violate this section, unless the person or entity providing an electronic communications service to the public:

- (1) Conspires with another person to violate this section; or
- (2) Knowingly aids and abets a violation of this section.

**History.** Acts 2005, No. 1776, § 1; 2007, No. 38, § 2; 2007, No. 827, §§ 36, 37.

## RESEARCH REFERENCES

**ALR.** Validity, Construction, and Application of State Statutes Prohibiting Child Luring as Applied to Cases Involving Luring of Child by Means of Electronic Communications. 33 A.L.R.6th 373.

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

## CASE NOTES

## ANALYSIS

**Entrapment As Affirmative Defense.  
Evidence.****Entrapment As Affirmative Defense.**

Defendant, who was convicted for internet stalking, should have been permitted to plead entrapment under § 5-2-209 as an affirmative defense while at the same time denying one or two elements of the crime, and therefore defendant's conviction was reversed, because the doctrine requiring a defendant to admit to all the elements of a crime in order to plead entrapment could result in punishing a defendant who was merely entrapped; the doctrine could possibly punish a defendant for a serious crime for merely seeking to require the state to prove its case aside from offering an affirmative defense. *Smoak v. State*, 2011 Ark. 529, 385 S.W.3d 257 (2011), rehearing denied, — S.W.3d —, 2012 Ark. LEXIS 26 (Ark. Jan. 19, 2012).

**Evidence.**

In defendant's trial for computer child pornography, § 5-27-603(a)(2), and internet stalking of a child, under subsection (a) of this section, the state did not fail to establish beyond a reasonable doubt that defendant believed the victim was only thirteen years old as the detective, who was the minor girl at the other end of the computer, told him that she was only thirteen years old in their correspondence and defendant noted the age difference as well as the fact that he would get into trouble if she told anyone about their chats. *Kelley v. State*, 103 Ark. App. 110, 286 S.W.3d 746 (2008).

Defendant's conviction for internet stalking of a child, in violation of subdivision (a)(2) of this section, was supported by the evidence where a "girl," who was really a police officer, informed defendant very early on that she was only 13 years old, defendant indicated that three condoms would suffice, and defendant indicated that they would decide after they met if she could "handle what he had." *Gikonyo v. State*, 102 Ark. App. 223, 283 S.W.3d 631 (2008).

Defendant's conviction for internet stalking of a child, in violation of subdivi-

sion (a)(2)(C) of this section, was supported by the evidence because the state presented evidence that defendant believed that he was talking to a 14-year-old girl; during one conversation, defendant asked the girl if she was still in high school, to which the girl replied that she was in the ninth grade. *Jackson v. State*, 2009 Ark. App. 466, 320 S.W.3d 13 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 672 (July 29, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 568 (Sept. 17, 2009).

In a case in which defendant appealed his conviction for violating subdivision (a)(2)(C) of this section, he argued unsuccessfully that the state presented insufficient evidence showing that he believed that he was talking to someone fifteen years of age or under. While the jury could certainly infer from the context of the conversation that "Misty" might be in high school or college, the chat specifically stated at the outset that "Misty" was a fourteen-year-old female living in Conway, Arkansas; viewing the evidence in the light most favorable to the state, it could not be said that there was no substantial evidence on that point. *Buffalo v. State*, 2010 Ark. App. 127, 374 S.W.3d 82 (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 226 (Apr. 22, 2010).

In a case in which defendant appealed his conviction for violating subdivision (a)(2)(C) of this section, he unsuccessfully argued that the evidence was insufficient to show that his purpose in meeting was to conduct inappropriate sexual acts. Even though defendant had stated that he did not have any condoms, the statute did not require a plan for sexual intercourse to be violated; given the discussion regarding oral sex, the sufficiency of the evidence was properly presented to the jury. *Buffalo v. State*, 2010 Ark. App. 127, 374 S.W.3d 82 (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 226 (Apr. 22, 2010).

In a case in which defendant appealed his conviction for violating subdivision (a)(2)(C) of this section, he unsuccessfully argued the trial court abused its discretion in admitting into evidence a cut-and-



paste word document from the police computer system because it was not properly authenticated or the best evidence. The trial court did not abuse its discretion by deeming the printout sufficiently authenticated by the officer who conducted the chat and who converted it to a printable Wordpad document, and the trial court did not abuse its discretion in admitting the printout into evidence because it was properly authenticated and was admissible as a duplicate or an original. *Buffalo v. State*, 2010 Ark. App. 127, 374 S.W.3d 82 (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 226 (Apr. 22, 2010).

Substantial evidence supported defendant's conviction for internet stalking of a child under this section as it supported a reasonable inference that defendant believed that a victim was under 15 years old and defendant admitted that defendant brought condoms to a prearranged meeting due to the possibility of having sex with the victim. *Tipton v. State*, 2011 Ark. App. 166, — S.W.3d — (2011).

Sufficient evidence showed that defendant, who was convicted of internet stalking under subdivision (a)(2) of this section, seduced, enticed, solicited, and lured a person whom defendant chatted with on-

line and believed to be a fifteen year-old girl, in an effort to arrange a meeting for sex because the transcript of the online chat and the testimony of the detective who posed as a fifteen year-old girl online showed that defendant made sex-related comments, asked for the person's address, and told the person that defendant had condoms, which were found in defendant's truck. *Smoak v. State*, 2011 Ark. 529, 385 S.W.3d 257 (2011), rehearing denied, — S.W.3d —, 2012 Ark. LEXIS 26 (Ark. Jan. 19, 2012).

There was sufficient evidence to convict defendant of internet stalking of a child in violation of this section, because he had a series of online chats with a police lieutenant representing himself as a fifteen-year-old female; defendant initiated a sexually explicit conversation, made plans to meet in person, and offered to teach the fifteen-year-old female a variety of sexual skills. There was sufficient evidence to prove that (1) defendant believed the person chatting online was age fifteen or younger; and (2) his purpose in meeting in person was to engage in sexual activity. *Todd v. State*, 2012 Ark. App. 626, — S.W.3d — (2012), rehearing denied, — S.W.3d —, 2012 Ark. App. LEXIS 831 (Ark. Ct. App. Dec. 12, 2012).

### **5-27-307. Sexually grooming a child.**

(a) As used in this section, "disseminates" means to allow to view, expose, furnish, present, sell, or otherwise distribute.

(b) A person commits sexually grooming a child if he or she knowingly disseminates to a child thirteen (13) years of age or younger with or without consideration a visual or print medium depicting sexually explicit conduct with the purpose to entice, induce, or groom the child thirteen (13) years of age or younger to engage in the following with a person:

- (1) Sexual intercourse;
- (2) Sexually explicit conduct; or
- (3) Deviate sexual activity.

(c) Sexually grooming a child is a:

- (1) Class D felony if the actor is twenty-one (21) years of age or older;
- or
- (2) Class A misdemeanor if the actor is younger than twenty-one (21) years of age.

(d) It is an affirmative defense to prosecution under this section that the actor was not more than three (3) years older than the victim.

(e) It is not a defense to prosecution under this section that the actor does not know the age of the child or believes the child is fourteen (14) years of age or older.

**History.** Acts 2013, No. 1114, § 2.

#### **SUBCHAPTER 4 — USE OF CHILDREN IN SEXUAL PERFORMANCES**

**SECTION.**

5-27-401. Definitions.

5-27-402. Employing or consenting to the use of a child in a sexual performance.

5-27-403. Producing, directing, or promoting a sexual performance by a child.

**SECTION.**

5-27-404. Good faith defense.

5-27-405. Determination of age of person.

#### **5-27-401. Definitions.**

As used in this subchapter:

(1) "Performance" means any play, dance, act, drama, piece, interlude, pantomime, show, scene, or other three-dimensional presentation or a part of a play, dance, act, drama, piece, interlude, pantomime, show, scene, or other three-dimensional presentation, whether:

(A) Performed live or photographed;

(B) Filmed;

(C) Videotaped; or

(D) Visually depicted by any other photographic, cinematic, magnetic, or electronic means;

(2) "Promote" means to:

(A) Sell, give, provide, distribute, circulate, disseminate, present, exhibit, or advertise; or

(B) Offer or agree to sell, give, provide, distribute, circulate, disseminate, present, exhibit, or advertise;

(3) "Sadomasochistic abuse" means flagellation, mutilation, or torture by or upon a person who is nude or clad in an undergarment or in revealing or bizarre costume or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed, in a sexual context;

(4) "Sexual conduct" means:

(A) Actual or simulated sexual intercourse;

(B) Deviate sexual activity;

(C) Sexual bestiality;

(D) Masturbation;

(E) Sadomasochistic abuse; or

(F) Lewd exhibition of the genitals or pubic area of any person or a breast of a female; and

(5) "Sexual performance" means any performance or part of a performance that includes sexual conduct by a child under eighteen (18) years of age.



**History.** Acts 1983, No. 451, § 1; A.S.A. 1947, § 41-4206; Acts 1995, No. 337, § 1; 1995, No. 1209, § 2; 2007, No. 827, § 38; 2011, No. 1190, § 2.

**Amendments.** The 2011 amendment substituted “eighteen (18)” for “seventeen (17)” in (5).

### 5-27-402. Employing or consenting to the use of a child in a sexual performance.

(a) It is unlawful for a person, knowing the character and content of the performance, to employ, authorize, or induce a child under eighteen (18) years of age to engage in a sexual performance.

(b) It is also unlawful for a parent or legal guardian or custodian of a child under eighteen (18) years of age to consent to the participation by the child in a sexual performance.

(c) A person who violates this section upon conviction is guilty of a:

- (1) Class C felony for the first offense; and
- (2) Class B felony for a subsequent offense.

**History.** Acts 1983, No. 451, § 2; A.S.A. 1947, § 41-4207; Acts 2011, No. 1190, § 3.

**Amendments.** The 2011 amendment substituted “eighteen (18)” for “seventeen (17)” in (a) and (b); and inserted “upon conviction” in the introductory language of (c).

### 5-27-403. Producing, directing, or promoting a sexual performance by a child.

(a) It is unlawful for a person, knowing the character and content of the material, to produce, direct, or promote a performance that includes sexual conduct by a child under eighteen (18) years of age.

(b) A person who violates this section upon conviction is guilty of a Class B felony.

**History.** Acts 1983, No. 451, § 3; A.S.A. 1947, § 41-4208; Acts 2011, No. 1190, § 4.

**Amendments.** The 2011 amendment substituted “eighteen (18)” for “seventeen (17)” in (a); and inserted “upon conviction” in (b).

## RESEARCH REFERENCES

**ALR.** Construction and Application of U.S. Sentencing Guideline § 2G1.3(b)(3), Providing Two-Level Enhancement for Use of Computer to Persuade, Induce, Entice, Coerce, or Facilitate the Travel of, Minor to Engage in Prohibited Sexual Conduct. 58 A.L.R. Fed. 2d 1.

### 5-27-404. Good faith defense.

It is an affirmative defense to a prosecution under this subchapter that the defendant in good faith reasonably believed that the person who engaged in the sexual conduct was eighteen (18) years of age or older.

**History.** Acts 1983, No. 451, § 4; A.S.A. substituted “eighteen (18)” for “seventeen 1947, § 41-4209; Acts 2011, No. 1190, § 5. (17).”

**Amendments.** The 2011 amendment

### **5-27-405. Determination of age of person.**

When it becomes necessary for purposes of this subchapter to determine whether a person who participated in sexual conduct was a child under eighteen (18) years of age, the court or jury may make this determination by any of the following methods:

- (1) Personal inspection of the person;
- (2) Inspection of the photograph, motion picture, or other material that shows the person engaging in the sexual performance;
- (3) Oral testimony by a witness to the sexual performance as to the age of the person based on the person’s appearance at the time;
- (4) Expert medical testimony based on the appearance of the person engaged in the sexual performance; or
- (5) Any other method authorized by law.

**History.** Acts 1983, No. 451, § 5; A.S.A. substituted “eighteen (18)” for “seventeen 1947, § 41-4210; Acts 2011, No. 1190, § 6. (17)” in the introductory language; and

**Amendments.** The 2011 amendment inserted “or other material” in (2).

## **SUBCHAPTER 5 — FRAUDULENT IDENTIFICATION DOCUMENTS FOR MINORS**

### **SECTION.**

5-27-503. Possession of fraudulent or al-

tered personal identifica-  
tion document unlawful.

### **5-27-503. Possession of fraudulent or altered personal identification document unlawful.**

(a) It is unlawful for:

(1) A person to possess a fraudulent or altered personal identification document for the purpose of providing a person under twenty-one (21) years of age identification that can be used for the purpose of purchasing an alcoholic beverage or other substance or material restricted for adult purchase or possession in accordance with existing law;

(2) A person under twenty-one (21) years of age to possess a fraudulent or altered personal identification document that can be used for the purpose of purchasing an alcoholic beverage or other substance or material restricted for adult purchase or possession in accordance with existing law; or

(3) A person under twenty-one (21) years of age to attempt to purchase an alcoholic beverage or use a fraudulent or altered personal identification document for the purpose of purchasing an alcoholic beverage illegally or other material or substance restricted to adult purchase or possession under existing law.

(b)(1)(A) If a seller of alcoholic beverages or the seller’s employee has reasonable cause to believe that a person has violated subdivision (a)(3) of this section, the person may be detained in a reasonable manner and for a reasonable length of time by the seller of alcoholic



beverages or the seller's employee in order that the seller of alcoholic beverages or the seller's employee may call for a certified law enforcement officer to conduct an investigation.

(B) The detention authorized under subdivision (b)(1)(A) of this section does not include a physical detention.

(2) If the seller of alcoholic beverages or the seller's employee attempts to verify the age of the person attempting to purchase an alcoholic beverage by way of photographic identification and complies with subdivision (b)(1) of this section, the detention by a seller of alcoholic beverages or the seller's employee does not render the seller of alcoholic beverages or the seller's employee criminally or civilly liable for false arrest, false imprisonment, or unlawful detention.

(3) After conducting an investigation under subdivision (b)(1)(A) of this section and within twenty-four (24) hours of the call from a seller of alcoholic beverages or the seller's employee for the investigation, a certified law enforcement officer may arrest a person without a warrant upon probable cause for believing that the person has violated subdivision (a)(3) of this section.

(c)(1) A person who violates this section is deemed guilty of a Class B misdemeanor.

(2) A subsequent violation of this section is a Class A misdemeanor.

(d)(1) Except for a minor subject to the penalty authorized by § 5-27-504, in addition to any penalty authorized by subdivision (c)(1) or (2) of this section, at the time of arrest for a violation of subdivision (a)(3) of this section, the arrested person shall immediately surrender his or her license, permit, or other evidence of driving privilege to the arresting law enforcement officer as provided in § 5-65-402.

(2) The Office of Driver Services or its designated official shall suspend or revoke the driving privilege of the arrested person or shall suspend any nonresident driving privilege of the arrested person, as provided in § 5-65-402.

(3) The period of suspension or revocation of driving privilege of the arrested person shall be based on the number of previous offenses of the arrested person as follows:

(A) Suspension for sixty (60) days for a first offense under subdivision (a)(3) of this section;

(B) Suspension for one hundred twenty (120) days for a second offense under subdivision (a)(3) of this section; and

(C) Suspension for one (1) year for a third or subsequent offense under subdivision (a)(3) of this section.

(4) In order to determine the number of previous offenses under subdivision (d)(3) of this section to consider when suspending or revoking the arrested person's driving privileges, the office shall consider as a previous offense any conviction under subdivision (a)(3) of this section regardless of when the offense occurred.

**History.** Acts 1991, No. 567, § 3; 2005, No. 1976, § 1; 2007, No. 922, § 1.

## SUBCHAPTER 6 — COMPUTER CRIMES AGAINST MINORS

### SECTION.

5-27-609. Possession of sexually explicit digital material.

## 5-27-603. Computer child pornography.

### CASE NOTES

#### ANALYSIS

Constitutionality.

Age of Child.

Sufficient Evidence.

#### Constitutionality.

Court did not agree with defendant's argument that this section was overbroad and unconstitutional on its face and as it applied to defendant and that it criminalized a substantial amount of lawful speech with no compelling state interest in doing so because the defendant's case involved actions rather than ideas. Defendant had conversations over the internet with an individual he thought was a thirteen year old girl, but was actually a police detective. *Kelley v. State*, 103 Ark. App. 110, 286 S.W.3d 746 (2008).

#### Age of Child.

In defendant's trial for computer child pornography, under subdivision (a)(2) of this section, and internet stalking of a child, § 5-27-306(a), the state did not fail to establish beyond a reasonable doubt that defendant believed the victim was only thirteen years old as the detective, who was the minor girl at the other end of the computer, told him that she was only thirteen years old in their correspondence and defendant noted the age difference as well as the fact that he would get into trouble if she told anyone about their chats. *Kelley v. State*, 103 Ark. App. 110, 286 S.W.3d 746 (2008).

#### Sufficient Evidence.

Substantial evidence supported defendant's conviction for computer child pornography, pursuant to subdivision (a)(2) of this section, because defendant's representations indicated that he believed the person he communicated with online to be a child, and defendant's sexually explicit comments provided sufficient evidence of the requisite state of mind under the statute. *Trice v. State*, 2010 Ark. App. 6, — S.W.3d — (2010).

Appellant's conviction for computer child pornography was affirmed where (1) both appellant and the screen name user were forty-six-year-old floor installers, with two sons; (2) the screen name user used appellant's personal computer, located in the bedroom appellant shared with his girlfriend, to communicate with an undercover persona of a thirteen year old girl between January and April 2009; (3) a webcam was found in appellant's bedroom behind some clutter in the computer desk; (4) appellant shared the home with his girlfriend and her minor daughter, and no other male lived with them; and (5) on April 6, 2009, two minutes after the screen name user and the undercover persona of a thirteen year old girl ended their first chat, appellant completed his taxes on the same computer. *Fikes v. State*, 2010 Ark. App. 803, 378 S.W.3d 302 (2010).

## 5-27-605. Computer exploitation of a child.

### RESEARCH REFERENCES

**ALR.** Construction and Application of U.S. Sentencing Guideline § 2G1.3(b)(3),

Providing Two-Level Enhancement for Use of Computer to Persuade, Induce,



Entice, Coerce, or Facilitate the Travel of,  
 Minor to Engage in Prohibited Sexual  
 Conduct. 58 A.L.R. Fed. 2d 1.

**5-27-609. Possession of sexually explicit digital material.**

(a) As used in this section:

(1) “Juvenile” means a person under eighteen (18) years of age; and

(2) “Nudity” means a:

(A) Showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering;

(B) Showing of the female breast with less than fully opaque covering of any portion of the female breast below the top of the nipple; or

(C) Depiction of covered male genitals in a discernibly turgid state; and

(3)(A) “Sexually explicit digital material” means any photograph, digitized impact, or visual depiction of a juvenile:

(i) In any condition of nudity; or

(ii) Involved in any prohibited sexual act.

(B) The distribution of sexually explicit digital material by a juvenile may commonly be referred to as “sexting”.

(b) A juvenile commits the offense of possession of sexually explicit digital material if the juvenile purposely creates, produces, distributes, presents, transmits, posts, exchanges, disseminates, or possesses through a computer, wireless communication device, or digital media, any sexually explicit digital material.

(c) It is an affirmative defense to the offense of possession of sexually explicit digital material that:

(1) A juvenile:

(A) Has not solicited the visual depiction;

(B) Does not subsequently distribute, present, transmit, post, print, disseminate, or exchange the visual depiction; and

(C) Deletes or destroys the visual depiction upon receipt; or

(2) A juvenile:

(A) Creates a visual depiction of himself or herself; and

(B) Does not subsequently distribute, present, transmit, post, print, disseminate, or exchange the visual depiction.

(d)(1) Possession of sexually explicit digital material is a Class A misdemeanor.

(2) A juvenile who pleads guilty or nolo contendere to or is found guilty of violating this section may be ordered to eight (8) hours of community service if it is the first offense for the juvenile.

**History.** Acts 2013, No. 1086, § 4.

# CHAPTER 28

## ABUSE OF ADULTS

### SUBCHAPTER.

#### 1. GENERAL PROVISIONS.

### SUBCHAPTER 1 — GENERAL PROVISIONS

### SECTION.

5-28-110. Penalties for violation of § 12-12-1701 et seq.

### 5-28-101. Definitions.

### RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2005 Arkansas General Assembly, Education Law, 28 U. Ark. Little Rock L. Rev. 347.

### CASE NOTES

#### ANALYSIS

Abuse.

Exploitation.

#### Abuse.

Evidence was sufficient to convict defendant of abusing an adult, § 5-28-103, as the state proved the victim was an endangered or impaired adult, defendant was the caregiver responsible for her protection, care, or custody, defendant neglected her, as specified under subdivision (10) of this section, and the neglect caused serious physical injury or risk of death; defendant should have been aware of the risk to the victim, and his failure to perceive the risk posed to his mother was a gross deviation from the care a reasonable, prudent person would exercise under the circumstances. *Law v. State*, 375 Ark. 505, 292 S.W.3d 277 (2009).

Definition of abuse did not contain the requirement that the person committing the abuse be a caregiver, except if the victim was a resident in an adult long-term care facility. Thus, because appellant was convicted of abuse and not neglect, the state was not required to prove that appellant was a caregiver to the victim. *Skomp v. State*, 2010 Ark. App. 313, 374 S.W.3d 779 (2010).

There was sufficient evidence to support appellant's conviction for abuse of an en-

dangered or impaired person where (1) the definition of abuse did not contain the requirement that the person committing the abuse be a caregiver, except under subdivision (1)(D) of this section, where the victim was a resident in an adult long-term care facility, which the victim in this case was not; (2) the state produced testimony that appellant would force the victim to stand for long periods of time and that he assisted in two other defendants' beatings of the victim, and produced evidence of the physical injuries with which she presented at the hospital; and (3) the state produced sufficient evidence to allow the jury to conclude that appellant's actions resulted in physical injury to the victim. *Skomp v. State*, 2010 Ark. App. 392, 375 S.W.3d 673 (2010).

#### Exploitation.

The evidence was sufficient to support defendant's conviction of abuse of an adult under § 5-28-103(a) because it showed both that the victim was vulnerable and that defendant exploited her. Exploitation was established where the evidence showed that defendant was hired to perform personal care, housekeeping duties, and errands for the infirm victim and her elderly mother, that defendant induced the victim to hire her directly rather than through a health care agency and to pay her more than \$10,000 in advance when



the victim's health deteriorated and her dependence increased, that defendant consistently made charges at retail stores with the victim's bank card that were greatly in excess of what had been normal for the victim prior to defendant's employment, that the retail charges increased as

the victim's condition declined, and that, when the victim was hospitalized and died, defendant did not continue to care for the victim's mother or return the bank card but instead absconded with the victim's automobile. *Jones v. State*, 2009 Ark. App. 619, — S.W.3d — (2009).

### 5-28-103. Criminal penalties for abuse of an endangered or impaired person.

#### CASE NOTES

##### ANALYSIS

Constitutionality.  
Evidence.  
Exploitation.

##### Constitutionality.

This section was not unconstitutionally vague in its definition of "caregiver" where the facts demonstrated that defendant clearly met the definition where he voluntarily assumed the responsibility for the protection, care, or custody of an endangered or impaired adult, and he was responsible for the care and supervision of that person; he was not an "entrapped innocent" and thus could not complain that the statute was unconstitutionally vague. *Law v. State*, 375 Ark. 505, 292 S.W.3d 277 (2009).

##### Evidence.

Evidence was sufficient to convict defendant of abusing an adult under this section as the state proved the victim was an endangered or impaired adult, defendant was the caregiver responsible for her protection, care, or custody, defendant neglected her, § 5-28-101(10), and the neglect caused serious physical injury or risk of death; defendant should have been aware of the risk to the victim, and his failure to perceive the risk posed to his mother was a gross deviation from the care a reasonable, prudent person would exercise under the circumstances. *Law v. State*, 375 Ark. 505, 292 S.W.3d 277 (2009).

Appellant's conviction for abuse of an impaired person was affirmed where (1) the definition of abuse did not contain the requirement that the person committing the abuse be a caregiver, except if the victim was a resident in an adult long-

term care facility and the victim in this case was not a resident in an adult long-term care facility; (2) the state produced sufficient evidence to allow the jury to conclude that appellant's actions resulted in physical injury to the victim; and (3) when two people assisted one another in the commission of a crime, each was an accomplice and criminally liable for the conduct of both. *Skomp v. State*, 2010 Ark. App. 313, 374 S.W.3d 779 (2010).

There was sufficient evidence to support appellant's conviction for abuse of an endangered or impaired person where (1) the definition of abuse did not contain the requirement that the person committing the abuse be a caregiver, except under subdivision (1)(D) of this section, where the victim was a resident in an adult long-term care facility, which the victim in this case was not; (2) the state produced testimony that appellant would force the victim to stand for long periods of time and that he assisted in two other defendants' beatings of the victim, and produced evidence of the physical injuries with which she presented at the hospital; and (3) the state produced sufficient evidence to allow the jury to conclude that appellant's actions resulted in physical injury to the victim. *Skomp v. State*, 2010 Ark. App. 392, 375 S.W.3d 673 (2010).

##### Exploitation.

The evidence was sufficient to support defendant's conviction of abuse of an adult because it showed both that the victim was vulnerable and that defendant exploited her where the evidence showed that defendant was hired to perform personal care, housekeeping duties, and errands for the infirm victim and her elderly mother, that defendant induced the victim to hire her directly rather than through a

health care agency and to pay her more than \$10,000 in advance when the victim's health deteriorated and her dependence increased, that defendant consistently made charges at retail stores with the victim's bank card that were greatly in excess of what had been normal for the victim prior to defendant's employment, that the retail charges increased as the

victim's condition declined, and that, when the victim was hospitalized and died, defendant did not continue to care for the victim's mother or return the bank card but instead absconded with the victim's automobile. *Jones v. State*, 2009 Ark. App. 619, — S.W.3d — (2009).

**Cited:** *Klines v. State*, 2010 Ark. App. 361, — S.W.3d — (2010).

### **5-28-110. Penalties for violation of § 12-12-1701 et seq.**

(a) Any person or caregiver required by the Adult and Long-Term Care Facility Resident Maltreatment Act, § 12-12-1701 et seq., to report a case of suspected adult maltreatment or long-term care facility resident maltreatment who purposely fails to do so is:

(1) Guilty of a Class B misdemeanor; and

(2) Civilly liable for damages proximately caused by the failure.

(b) Any person, official, or institution willfully making a false notification by the Adult and Long-Term Care Facility Resident Maltreatment Act, § 12-12-1701 et seq., knowing the allegation to be false, is guilty of a:

(1) Class A misdemeanor; or

(2) Class D felony if the person, official, or institution has been previously convicted of making a false allegation.

(c) Any person who willfully permits and any other person who encourages the release of data or information contained in the adult and long-term care facility maltreatment central registry to a person to whom disclosure is not permitted under this section, § 5-28-201 [repealed], or §§ 5-28-203 — 5-28-221 [repealed] is guilty of a Class A misdemeanor.

(d) Any person required to report a death as the result of suspected adult maltreatment or long-term care facility resident maltreatment who knowingly fails to make a report immediately to the appropriate coroner is guilty of a Class C misdemeanor.

(e) Any person required to report suspected adult maltreatment or long-term care facility resident maltreatment who knowingly fails to make a report within twenty-four (24) hours or on the next business day, whichever is earlier, is guilty of a Class C misdemeanor.

**History.** Acts 1983, No. 452, § 13; A.S.A. 1947, § 59-1313; Acts 1993, No. 1292, § 5; 1995, No. 1338, § 2; 2003, No. 1046, § 13; 2005, No. 1810, § 8; 2005, No. 1994, § 298.

**Publisher's Notes.** This section is being set out to update a reference in the section heading and in the introduction language of (a) and (b).



**SUBTITLE 4. OFFENSES AGAINST PROPERTY**

**CHAPTER 36**

**THEFT**

SUBCHAPTER.

- 1. GENERAL PROVISIONS.
- 3. WIRELESS SERVICES THEFT PREVENTION LAW.

**SUBCHAPTER 1 — GENERAL PROVISIONS**

SECTION.

- 5-36-102. Consolidation of offenses — Shoplifting presumption — Theft by deception presumption at auction of livestock — Amount of theft.
- 5-36-103. Theft of property.
- 5-36-104. Theft of services.
- 5-36-106. Theft by receiving.

SECTION.

- 5-36-116. Shoplifting.
- 5-36-120. Theft of motor fuel.
- 5-36-123. Theft of scrap metal.
- 5-36-124. Theft by receiving of scrap metal.
- 5-36-125. Unlawful transfer of stolen property to a pawn shop or pawnbroker.

**5-36-101. Definitions.**

**RESEARCH REFERENCES**

**ALR.** What is “Property of Another” Within Statute Proscribing Larceny, Theft, or Embezzlement of Property of Another. 57 A.L.R.6th 445.

**CASE NOTES**

ANALYSIS

Deprivation.  
Service.  
Value.

**Deprivation.**

Evidence was sufficient to prove the theft element of aggravated robbery; evidence showed that defendant used physical force to at least temporarily deprive victim of her car, which was sufficient proof. *Winston v. State*, 368 Ark. 105, 243 S.W.3d 304 (2006).

Defendant’s convictions for aggravated robbery and theft were proper because deprivation of property required only disposal under circumstances that made its restoration unlikely under subdivision (4)(C) of this section. Thus, defendant’s actions in attempting to sell the victim’s property following the homicide clearly showed a purpose to commit theft. *Young*

*v. State*, 371 Ark. 393, 266 S.W.3d 744 (2007).

**Service.**

Defendant was charged with theft of services for his failure to pay the bail-bond company \$7,570. The circuit court granted him a directed verdict because the definition of “services” under § 5-36-104 did not include the services provided by bail-bonding companies; additionally, the court found that the bail bond contract did not constitute “professional services” as that term was used in subdivision (9) of this section. *State v. Williams*, 2013 Ark. 164, — S.W.3d — (2013).

**Value.**

Under § 5-36-103, the state failed to produce substantial evidence as to the value of the stolen property; however, the state produced substantial evidence to support a finding that defendant acted with the requisite intent to commit the

offense of theft of property, a class A misdemeanor. *Gines v. State*, 2009 Ark. App. 628, — S.W.3d — (2009).

In a case in which defendant was convicted on theft of property, in violation of § 5-36-103, even if he had preserved his claim that the evidence was insufficient to show that the value of the property was \$2,500 or more, his conviction would be affirmed. The victim's testimony that he purchased the big-screen television for \$1800 only four months prior to it being stolen was a factor that the court, as fact-finder, was permitted to consider, and the victim also testified that other items were stolen, including thousands of dollars in jewelry. *Walker v. State*, 2010 Ark. App. 63, — S.W.3d — (2010).

Trial court did not err in convicting defendant of theft of property with a value less than \$2,500 but more than \$500 in violation of § 5-36-103(a)(1) and (b)(2)(A) for stealing merchandise from a department store because a manager's testimony, in conjunction with the testimony of another employee, who was also a manager, was sufficient to lay the foundation for the introduction of a register receipt under the business-records exception to the hearsay rule, Ark. R. Evid. 803(6), as proof of the value of the stolen merchandise; the employee's testimony indicated that he knew the recovered items were stolen because they did not bear certain labels or electronic receipts that the store regularly places on all merchandise, the manager testified that he knew the value of the stolen merchandise by following the store's standard practice of adding up the value by ringing it up on the store's register, and the receipt bore an electronic date

and time stamp, as well as other numeric information about the merchandise, including the label information from each item. *Pace v. State*, 2010 Ark. App. 491, 375 S.W.3d 751 (2010).

Defendant's conviction for theft of property under § 5-36-103(a)(1) was appropriate because the state's proof that the items he stole had a value in excess of \$500 was adequate, under subdivision (12)(A)(i) of this section. The items were mostly purchased less than a year before the burglary, the purchase price so greatly exceeded the \$500 statutory value threshold, and thus, the victim's testimony constitutes substantial evidence of value. *Vault v. State*, 2012 Ark. App. 283, — S.W.3d — (2012).

Defendant's conviction for theft by receiving, a Class D felony, was proper because the State proved that the stolen trailer's value, as defined in subdivision (12)(A)(i) of this section, was in excess of \$1,000; the owner of a trailer dealership testified that the owner sold the trailer at issue to the victim for \$1,475 and even with the damage to the trailer, it would still be worth over \$1,000. *Johnson v. State*, 2012 Ark. App. 615, — S.W.3d — (2012).

Defendant's conviction for theft of property as a Class B felony was supported by the evidence because there was evidence that the car was valued at \$2,500 or more under subdivision (12)(A)(i) of this section; the car was four years old, and the victim stated that the victim paid \$20,000 for it. *Moore v. State*, 2013 Ark. App. 107, — S.W.3d — (2013).

**Cited:** *Russell v. State*, 367 Ark. 557, 242 S.W.3d 265 (2006).

## **5-36-102. Consolidation of offenses — Shoplifting presumption — Theft by deception presumption at auction of livestock — Amount of theft.**

(a) Conduct denominated theft in this chapter constitutes a single offense embracing the separate offenses known before January 1, 1976, as:

- (1) Larceny;
- (2) Embezzlement;
- (3) False pretense;
- (4) Extortion;
- (5) Blackmail;
- (6) Fraudulent conversion;
- (7) Receiving stolen property; and



(8) Other similar offenses.

(b) Notwithstanding the specification of a different manner in the indictment or information, a criminal charge of theft may be supported by evidence that it was committed in any manner that would be theft under this chapter subject only to the power of the court to ensure a fair trial by granting a continuance or other appropriate relief if the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

(c) The knowing concealment, upon an actor's person or the person of another, of an unpurchased good or merchandise offered for sale by any store or other business establishment, gives rise to a presumption that the actor took the good or merchandise with the purpose of depriving the owner or another person having an interest in the good or merchandise.

(d) A person who is subject to 7 U.S.C. § 181 et seq. that obtains livestock from a commission merchant by representing that the person will make prompt payment is presumed to have obtained the livestock by deception if the person fails to make payment in accordance with 7 U.S.C. § 228b.

(e)(1) The amount involved in a theft is deemed to be the highest value, by any reasonable standard, of the property or service that the actor obtained or attempted to obtain.

(2) An amount involved in a theft committed pursuant to one (1) scheme or course of conduct, whether from one (1) or more persons, may be aggregated in determining the grade of the offense.

**History.** Acts 1975, No. 280, § 2202; A.S.A. 1947, § 41-2202; Acts 2009, No. 1401, § 1.

inserted "Theft by deception at auction of livestock presumption —" in the section heading; inserted present (d); and redesignated (d) as (e).

**Amendments.** The 2009 amendment

## CASE NOTES

### Evidence.

Appellants' convictions for theft of property were affirmed because substantial evidence supported the convictions where (1) while appellants maintained they were simply running a business and made some poor business decisions, the testimony of the victims established a pattern of taking and exercising unauthorized control over the victims' money with the purpose of depriving the victims of their money; (2) the pattern demonstrated that appellants

sold items to the victims, accepted the victims' money, purposefully and knowingly delayed delivery of the merchandise, and offered multiple and most often untrue excuses for why the orders did not arrive; and (3) the evidence showed that appellants would tell customers that an item was in shipping, was shipped in the wrong color, back ordered, or damaged in shipping. *Williams v. State*, 2009 Ark. App. 848, — S.W.3d — (2009).

## 5-36-103. Theft of property.

(a) A person commits theft of property if he or she knowingly:

(1) Takes or exercises unauthorized control over or makes an unauthorized transfer of an interest in the property of another person with the purpose of depriving the owner of the property; or

(2) Obtains the property of another person by deception or by threat with the purpose of depriving the owner of the property.

(b) Theft of property is a:

(1) Class B felony if:

(A) The value of the property is twenty-five thousand dollars (\$25,000) or more;

(B) The property is obtained by the threat of serious physical injury to any person or destruction of the occupiable structure of another person;

(C) The property is obtained by threat and the actor stands in a confidential or fiduciary relationship to the person threatened;

(D) The property is:

(i) Anhydrous ammonia in any form; or

(ii) A product containing any percentage of anhydrous ammonia in any form; or

(E)(i) The property is utility property and the value of the property is five hundred dollars (\$500) or more.

(ii) As used in subdivision (b)(1)(E)(i) of this section:

(a) "Utility" means any person or entity providing to the public gas, electricity, water, sewer, telephone, telegraph, radio, radio common carrier, railway, railroad, cable and broadcast television, video, or Internet services; and

(b) "Utility property" means any component that is reasonably necessary to provide utility services, including without limitation any wire, pole, facility, machinery, tool, equipment, cable, insulator, switch, signal, duct, fiber optic cable, conduit, plant, work, system, substation, transmission or distribution structure, line, street lighting fixture, generating plant, equipment, pipe, main, transformer, underground line, gas compressor, meter, or any other building or structure or part of a building or structure that a utility uses in the production or use of its services;

(2) Class C felony if:

(A) The value of the property is less than twenty-five thousand dollars (\$25,000) but more than five thousand dollars (\$5,000);

(B) The property is obtained by threat;

(C) The property is a firearm valued at two thousand five hundred dollars (\$2,500) or more;

(D)(i) The property is building material obtained from a permitted construction site and the value of the building material is five hundred dollars (\$500) or more.

(ii) As used in subdivision (b)(2)(D)(i) of this section:

(a) "Building material" means lumber, a construction tool, a window, a door, copper tubing or wire, or any other material or good used in the construction or rebuilding of a building or a structure; and

(b) "Permitted construction site" means the site of construction, alteration, painting, or repair of a building or a structure for which a building permit has been issued by a city of the first class, a city of the second class, an incorporated town, or a county; or



(E) The value of the property is five hundred dollars (\$500) or more and the theft occurred in an area declared to be under a state of emergency pursuant to proclamation by the President of the United States, the Governor, or the executive officer of a city or county;

(3) Class D felony if:

(A) The value of the property is five thousand dollars (\$5,000) or less but more than one thousand dollars (\$1,000);

(B) The property is a firearm valued at less than two thousand five hundred dollars (\$2,500);

(C) The property is a:

(i) Credit card or credit card account number; or

(ii) Debit card or debit card account number;

(D) The value of the property is at least one hundred dollars (\$100) or more but less than five hundred dollars (\$500) and the theft occurred in an area declared to be under a state of emergency pursuant to proclamation by the President of the United States, the Governor, or the executive officer of a city or county;

(E) The property is livestock and the value of the livestock is in excess of two hundred dollars (\$200); or

(F) The property is an electric power line, gas line, water line, wire or fiber insulator, electric motor, or other similar apparatus connected to a farm shop, on-farm grain drying and storage complex, heating and cooling system, environmental control system, animal production facility, irrigation system, or dwelling; or

(4) Class A misdemeanor if:

(A) The value of the property is one thousand dollars (\$1,000) or less; or

(B) The property has inherent, subjective, or idiosyncratic value to its owner or possessor even if the property has no market value or replacement cost.

(c)(1) Upon the proclamation of a state of emergency by the President of the United States or the Governor or upon the declaration of a local emergency by the executive officer of any city or county and for a period of thirty (30) days following that declaration, the penalty for theft of property is enhanced if the property is:

(A) A generator intended for use by:

(i) A public facility;

(ii) A nursing home or hospital;

(iii) An airport;

(iv) A public safety device;

(v) A communication tower or facility;

(vi) A public utility;

(vii) A water system or sewer system;

(viii) A public safety agency; or

(ix) Any other facility or use providing a vital service; or

(B) Any other equipment used in the transmission of electric power or telephone service.

(2) As used in this subsection:

(A) “Public safety agency” means an agency of the State of Arkansas or a functional division of a political subdivision that provides:

- (i) Firefighting and rescue;
- (ii) Natural or human-caused disaster or major emergency response;
- (iii) Law enforcement; or
- (iv) Ambulance or emergency medical services; and

(B) “Public safety device” includes, but is not limited to, a traffic signaling device or a railroad crossing device.

(3) The penalty is enhanced as follows:

(A)(i) The fine for the offense shall be at least five thousand dollars (\$5,000) and not more than fifty thousand dollars (\$50,000).

(ii) The fine is mandatory; and

(B) The offense is a Class D felony if it would have been a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2203; 1977, No. 360, § 8; 1979, No. 592, § 1; 1983, No. 719, § 1; A.S.A. 1947, § 41-2203; Acts 1987, No. 934, § 3; 1991, No. 712, § 1; 1995, No. 277, § 1; 1997, No. 516, § 1; 2001, No. 157, § 1; No. 1195, § 1; 2003, No. 838, § 1; 2005, No. 1442, § 1; 2007, No. 693, § 1; 2007, No. 827, § 39; 2009, No. 1295, § 2; 2011, No. 570, § 23; 2011, No. 1120, § 8; 2011, No. 1227, § 1; 2013, No. 1125, § 7.

**A.C.R.C. Notes.** Acts 2009, No. 1295, § 1, provided: “This act shall be known and may be cited as the ‘Private Property Protection Act.’”

Acts 2011, No. 570, § 1, provided: “Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offend-

ers accountable, and contain correction costs.”

Pursuant to Acts 2011, No. 1120, § 16, the amendments to this section by Acts 2011, No. 1120, § 8 are partially superseded by the amendments to this section by Acts 2011, No. 570, § 23.

**Amendments.** The 2009 amendment added (b)(1)(F) and (b)(2)(F); deleted “(c)” at the end of the introductory language of (c)(2); and made related changes.

The 2011 amendment by No. 570 rewrote the section.

The 2011 amendment by No. 1120 inserted present (b)(3)(F).

The 2011 amendment by No. 1227 inserted present (b)(1)(E).

The 2013 amendment substituted “The property is an” for “An” in (b)(3)(F).

## CASE NOTES

### ANALYSIS

Conspiracy.  
Deception.  
Dismissal Not Warranted.  
Elements  
Evidence.  
—Sufficiency.  
Intent.  
Jurisdiction.  
Reasonable Cause to Arrest.  
Sentence.  
Unauthorized Taking.

Value.

### Conspiracy.

Defendant committed an overt act in furtherance of a conspiracy to commit kidnapping, aggravated robbery, theft of property, and aggravated residential burglary because he took another person to his residence and showed the person the inside of the premises, discussed how to break in the residence and how to subdue his wife, and identified the property to be taken from the residence. *Winkler v.*



State, 2012 Ark. App. 704, — S.W.3d —, 2012 Ark. App. LEXIS 825 (Dec. 12, 2012).

### **Deception.**

State presented substantial evidence that defendant knowingly deceived a wholesale and retail distributor of petroleum products in an effort to get fuel for a convenience store and gas station owned by defendant's wife; there was substantial evidence that defendant deceived the distributor by falsely representing himself as owner of the store and property used as collateral, and the representations were made to induce the distributor to continue supplying fuel. *Iqbal v. State*, 2011 Ark. App. 221, 382 S.W.3d 755 (2011), review denied, — S.W.3d —, 2011 Ark. LEXIS 394 (Ark. App. 21, 2011).

### **Dismissal Not Warranted.**

Where charges against defendant for alleging defrauding insurers were dismissed, this did not mandate a later dismissal of subsequently filed charges alleging Medicaid fraud under *res judicata*, issue preclusion, or § 5-1-113 because the crimes were not the same. *Dilday v. State*, 369 Ark. 1, 250 S.W.3d 217 (2007).

### **Elements**

State had to prove that appellant took or exercised unauthorized control over another's property with the purpose of depriving him of that property, which was a debit card. *Blakely v. State*, 2013 Ark. App. 37, — S.W.3d — (2013).

### **Evidence.**

Defendant's conviction for theft of property from a former employer, in violation of subdivision (a)(1) of this section, was not supported by the evidence because the factfinder had to speculate to choose whether defendant stole a crane and winches or whether the equipment was sold outside a cashier's presence and the cashier did not see customers outside the store; the state presented no evidence, documentary or oral, of merchandise actually missing from the store's inventory. *King v. State*, 100 Ark. App. 208, 266 S.W.3d 205 (2007).

Evidence was sufficient to sustain defendant's convictions for aggravated robbery, residential burglary, and felony theft of property because an accomplice testified that he and defendant had a purpose of committing theft when they went to the

victim's apartment, defendant used physical force upon the victim, defendant was armed with a deadly weapon, and a witness testified that she observed defendant carry out a television and load it into the car. *Navarro v. State*, 371 Ark. 179, 264 S.W.3d 530 (2007).

Defendant's convictions for aggravated robbery and theft were proper because defendant employed physical force upon the victim, admitted to stabbing the victim, and was armed with a deadly weapon. Further, the fact that defendant pawned the victim's tools and tried to sell other stolen items established a purpose to commit theft. *Young v. State*, 371 Ark. 393, 266 S.W.3d 744 (2007).

The state was not entitled to a rehearing of a decision overturning defendant's conviction for theft under subdivision (a)(1) of this section because the evidence was insufficient as it left the fact-finder to speculation and conjecture; the state proved only that a co-worker saw defendant moving a store's hardware out the front door. Defendant's job at the store, however, was to move hardware; without more, the co-worker's testimony did not prove that defendant was guilty of exercising unauthorized control over any store item with the purpose of permanently depriving the store of it. *King v. State*, 100 Ark. App. 211, 266 S.W.3d 205 (2007).

Substantial evidence indicated that defendant was armed with a deadly weapon for the purpose of committing theft, and defendant was part of a plan to take the victim's money; there did not have to be an actual transfer of property to take place for the offense of aggravated robbery to be complete, and defendant and another clearly followed through with the plan, whether or not they verbally acknowledged their agreement at the time the plan was conceived. *Moore v. State*, 372 Ark. 579, 279 S.W.3d 69 (2008).

In defendant's attempted capital murder case, the state presented substantial evidence of defendant's intent to commit theft because there was the victim's testimony, in which she stated that defendant told her that he was going to rob her, there was the fact that two twenty-dollar bills and some quarters were missing from the store after the attack, and there was also defendant's own videotaped statement in which he admitted to taking money from

the cash register. *Goodwin v. State*, 373 Ark. 53, 281 S.W.3d 258 (2008).

Where the victim testified that he discovered that two jars of coins were missing from his house after a visit from defendant and his cohort, an employee of a grocery store saw defendant's cohort cash in the coins and then throw away a jar; the theft victim identified the jar as his. In the second case, the victim testified that a five-gallon water jug filled with coins was stolen from his house shortly after he had spoken with defendant and his cohort at a club; based on the circumstantial evidence, along with defendant's admission that he had stolen coins from the second victim before, the evidence was sufficient to support defendant's conviction for two counts of theft under subsection (a) of this section. *Mathis v. State*, 2009 Ark. App. 181, 314 S.W.3d 280 (2009).

When a trailer was removed from the owner's property without her permission, defendant stated that he purchased the trailer from a third party and it was parked on his property. The evidence was sufficient to show that defendant possessed the trailer with the intent to deprive the owner of the property in violation of this section; defendant was properly convicted of the theft of property with a value between \$500 and \$2500 in violation of this section. *Gray v. State*, 2009 Ark. App. 572, — S.W.3d — (2009).

Where the state's witness testified that she and defendant drove to the victim's RV in order to rob the victim, defendant entered the residence, grabbed the victim's wallet, handed it to the witness, and then she heard a pop sound; a second witness testified that he had seen defendant with a handgun that day, and defendant told him that he had shot the victim in the head. After the victim was found dead, defendant was convicted of first degree felony murder in violation of § 5-10-102(a)(1) with theft as the underlying felony under this section; defendant's challenge to the sufficiency of the evidence supporting his conviction for theft was denied. *Lockhart v. State*, 2009 Ark. App. 587, — S.W.3d — (2009).

Evidence was sufficient to support defendant's convictions for residential burglary and theft of property where defendant pawned a gun and a pendant that were stolen from the victims' home and, according to a witness, defendant admit-

ted that he participated in the burglary and theft. *Stigger v. State*, 2009 Ark. App. 596, — S.W.3d — (2009).

Under this section, the state failed to produce substantial evidence as to the value of the stolen property; however, the state produced substantial evidence to support a finding that defendant acted with the requisite intent to commit the offense of theft of property, a class A misdemeanor. *Gines v. State*, 2009 Ark. App. 628, — S.W.3d — (2009).

Appellants' convictions for theft of property were affirmed because substantial evidence supported the convictions where (1) while appellants maintained they were simply running a business and made some poor business decisions, the testimony of the victims established a pattern of taking and exercising unauthorized control over the victims' money with the purpose of depriving the victims of their money; (2) the pattern demonstrated that appellants sold items to the victims, accepted the victims' money, purposefully and knowingly delayed delivery of the merchandise, and offered multiple and most often untrue excuses for why the orders did not arrive; and (3) the evidence showed that appellants would tell customers that an item was in shipping, was shipped in the wrong color, back ordered, or damaged in shipping. *Williams v. State*, 2009 Ark. App. 848, — S.W.3d — (2009).

Evidence was sufficient to support defendant's conviction for misdemeanor theft of property in violation of subdivision (a)(1) of this section because he beat and kicked the victim, took his cell phone and wallet, asked for additional money, threatened to shoot him, and ran away; the evidence was sufficient to establish that defendant either took the items in question or participated in taking them and that afterward he fled from the scene of the crime, and it was of no consequence whether defendant was the principal or an accomplice. *Sims v. State*, 2010 Ark. App. 133, — S.W.3d — (2010).

Defendant's convictions for breaking or entering and theft of property in violation of subdivision (a)(1) of this section were proper because there was substantial evidence showing that defendant, for the purpose of committing a theft or felony, broke into the victim's vehicle. Substantial evidence also existed to support the finding that defendant knowingly took



and exercised unauthorized control over the victim's tow-truck keys with the purpose of depriving the victim of them. *Washington v. State*, 2010 Ark. App. 339, 374 S.W.3d 822 (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 379 (June 24, 2010).

Bank customer properly charged with theft where while the customer did not bear any criminal intent when she deposited the check and withdrew the funds, she later realized that it was probably a fake and decidedly refused to repay the original owner, the bank, when the check was discovered to indeed be counterfeit. *Brooks v. First State Bank, N.A.*, 2010 Ark. App. 342, 374 S.W.3d 846 (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 518 (June 2, 2010), review denied, — S.W.3d —, 2010 Ark. LEXIS 622 (Ark. Dec. 9, 2010).

Defendant admitted to taking credit cards without permission and unlawfully entering a home without permission, and that defendant drove a car and wrecked it; thus, the state offered sufficient proof that defendant committed theft of property under subdivision (a)(1) of this section. *Cody v. State*, 2010 Ark. App. 542, — S.W.3d — (2010).

Defendant's convictions for breaking or entering, in violation of § 5-39-202(1), and theft of property, in violation of subdivision (a)(1) of this section, were supported by the evidence because defendant's unlawful presence near a storage shed, flight from the victim, and association with persons involved in the crimes suggested that defendant jointly participated in the crimes under § 5-2-402(a)(2). *Goforth v. State*, 2010 Ark. App. 735, — S.W.3d — (2010).

Evidence that one of the victims of a home-invasion robbery gave defendant her cell phone after seeing him pull one of the other victims out from under a bed by her hair was sufficient to sustain defendant's conviction of theft of property. *Morris v. State*, 2011 Ark. App. 12, — S.W.3d — (2011).

Evidence that defendant took money from a store while openly brandishing a firearm was sufficient to support his conviction for theft of property. *Lambert v. State*, 2011 Ark. App. 258, — S.W.3d — (2011).

Evidence that defendant violated her employer's policy by rummaging in a stockroom where the purses she stole were kept was properly admitted under Ark. R. Evid. 404(b) to demonstrate her plan, motive, opportunity, and intent, as her prior conduct was relevant to show that she knew where the purses were, how to get to them, and which ones she wanted. *Howard v. State*, 2011 Ark. App. 573, 386 S.W.3d 106 (2011), rehearing denied, — S.W.3d —, 2011 Ark. App. LEXIS 716 (Ark. Ct. App. Nov. 9, 2011), review denied, — S.W.3d —, 2011 Ark. LEXIS 626 (Ark. Dec. 1, 2011).

Evidence that defendant coveted a certain brand of designer purse her employer sold; that she and a fellow employee were videotaped rummaging through a stockroom that contained such purses; that defendant bought a purse from her employer that was placed in an oversized shopping bag; that the bag proved to contain not only the purse that she had purchased, but three designer purses as well, was sufficient to establish under § 5-36-101 that she knew there were purses in the shopping bag that she had not paid for. *Howard v. State*, 2011 Ark. App. 573, 386 S.W.3d 106 (2011), rehearing denied, — S.W.3d —, 2011 Ark. App. LEXIS 716 (Ark. Ct. App. Nov. 9, 2011), review denied, — S.W.3d —, 2011 Ark. LEXIS 626 (Ark. Dec. 1, 2011).

Defendant's conviction for theft of property under subdivision (a)(1) of this section was appropriate because the state's proof that the items he stole had a value in excess of \$500 was adequate, § 5-36-101(12)(A)(i). The items were mostly purchased less than a year before the burglary, the purchase price so greatly exceeded the \$500 statutory value threshold, and thus, the victim's testimony constitutes substantial evidence of value. *Vault v. State*, 2012 Ark. App. 283, — S.W.3d — (2012).

Where defendant was convicted for residential burglary and theft under §§ 5-39-201(a)(1) and subdivision (a)(1) of this section, the trial court did not err by denying his motion for a directed verdict because the record showed that the victims returned from work to discover that their home had been burglarized; the back door of the residence had been kicked in and \$3,000 worth of property was missing. As defendant's palm print was found on

the entertainment table, the jury was not required to resort to speculation or conjecture in reaching its verdicts. *Hicks v. State*, 2012 Ark. App. 667, — S.W.3d —, 2012 Ark. App. LEXIS 791 (Nov. 28, 2012).

Court agreed with the State's argument that the evidence presented by the victim that appellant put him in a headlock, demanded money, and took his credit card supported the verdict. *Blakely v. State*, 2013 Ark. App. 37, — S.W.3d — (2013).

Evidence was sufficient to sustain defendant's adjudication for theft because a witness saw the incident, identified the vehicle and the license-plate number, and provided a physical description of both the driver and the individual who pumped the gas. An officer testified that he took the witness's complaint and encountered defendant at the residence listed on the vehicle registration; defendant matched the physical description given by the witness of the individual who pumped the gas. *K.A.S. v. State*, 2013 Ark. App. 236, — S.W.3d — (2013).

#### —Sufficiency.

Defendant's convictions for breaking or entering and theft of property were affirmed where defendant's fingerprints were found inside the passenger door along the top edge of the window of the car that was broken into. *Phillips v. State*, 88 Ark. App. 17, 194 S.W.3d 222 (2004), *aff'd*, 361 Ark. 1, 203 S.W.3d 630 (2005).

Evidence was sufficient to sustain defendant's forgery and theft convictions where she did not offer a reasonable explanation of how she acquired the forged check; therefore, an inference that she committed the forgery or was an accessory to its commission was warranted and the court did not err in inferring defendant's intent. *DeShazer v. State*, 94 Ark. App. 363, 230 S.W.3d 285 (2006).

Evidence was sufficient to convict defendant of first degree murder and theft where, in addition to the testimony of defendant's wife, who was an accomplice, defendant's own statements to the police, his conduct before and after the crime, and statements of the victim's friends regarding her fear of defendant tended to connect him to the crimes; further, although there was no evidence that defendant ever drove victim's Cadillac or had the vehicle in his possession, the jury might have determined that defendant

facilitated the theft by leaving the accomplice without a vehicle at the victim's house, and there was evidence that the theft of the Cadillac was part of the plan to murder the victim. *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006).

Evidence was sufficient to prove the theft element of aggravated robbery; evidence showed that defendant used physical force to at least temporarily deprive victim of her car, which was sufficient proof. *Winston v. State*, 368 Ark. 105, 243 S.W.3d 304 (2006).

In a case in which defendant was convicted on theft of property, in violation of this section, and he argued on appeal that the evidence was insufficient to show that the value of the property exceeded \$2,500 or more, he had not preserved that issue for appeal. His Ark. R. Crim. P. 33.1(b) motion for dismissal and renewal of that motion made no mention whatsoever of the value of the stolen property. *Walker v. State*, 2010 Ark. App. 63, — S.W.3d — (2010).

In a case in which defendant was convicted on theft of property, in violation of this section, even if he had preserved his claim that the evidence was insufficient to show that the value of the property was \$2,500 or more, his conviction would be affirmed. The victim's testimony that he purchased the big-screen television for \$1800 only four months prior to it being stolen was a factor that the court, as fact-finder, was permitted to consider, and the victim also testified that other items were stolen, including thousands of dollars in jewelry. *Walker v. State*, 2010 Ark. App. 63, — S.W.3d — (2010).

Evidence was sufficient to support defendant's conviction for theft of property valued in excess of \$500 but less than \$2,500, pursuant to subdivision (b)(2)(A) of this section, because a store owner based her calculation of the amount stolen on business records, under Ark. R. Evid. 803(6). Further, a police detective's testimony that over \$670 was found on the persons of defendant and his accomplice following the theft, and that an additional \$503, which defendant had hidden, was found the following day, was more than enough to prove that defendant stole over \$500. *Scott v. State*, 2010 Ark. App. 114, — S.W.3d — (2010).



**Intent.**

Evidence that defendant demanded a bank courier's cell phone, bags, and keys while armed with a gun was sufficient to support defendant's conviction for theft, despite his contention that he did not retain the items but took them only to facilitate his flight, and had no intent to permanently deprive the owner of them. *Ali v. State*, 2011 Ark. App. 758, — S.W.3d — (2011).

In his directed verdict motion, appellant did not argue that the State did not prove that he knew of the card's existence in the wallet when he stole it, and that he purposely deprived the owner of the card, and thus this argument was barred from appellate review; even if the court reached the argument, it lacked merit, because (1) the statute only required that one knowingly take unauthorized control over property, and it did not require that one know the value or character of the property that was taken, (2) appellant did not dispute that he knowingly took the owner's wallet with the intent of depriving him of it, (3) his knowledge of the contents of the wallet was not necessary for his conviction, and (4) his unauthorized taking of the wallet that had the debit card was one act and he was liable for all property taken, such that the evidence was sufficient to support his theft conviction. *Blakely v. State*, 2013 Ark. App. 37, — S.W.3d — (2013).

**Jurisdiction.**

Arkansas trial court had jurisdiction over defendant, a Georgia resident, during his trial for theft of property and computer fraud where defendant caused the victim, an Arkansas resident, to access her computer by virtue of his email correspondence for the purpose of obtaining money with a false or fraudulent intent, representation, or promise. *Powell v. State*, 97 Ark. App. 239, 246 S.W.3d 891 (2007).

**Reasonable Cause to Arrest.**

Denial of motion to suppress was not clearly against the preponderance of the evidence, because the inventory search of defendant's vehicle was proper upon defendant's lawful arrest, and it was standard police policy to inventory the contents of any vehicle before having it towed; at the time of defendant's arrest theft of property was a Class C felony if

the value of the property was less than \$2,500 but more than \$500, and criminal attempt was a Class D felony if the offense attempted was a Class C felony. *Boykin v. State*, 2012 Ark. App. 274, — S.W.3d — (2012).

**Sentence.**

Because the sentence of 20 years' imprisonment with a 10-year suspended imposition of sentence, while falling within the statutory-sentencing range for Class A arson under §§ 5-38-301(b)(5), 5-4-401(a)(2), exceeded the range for Class B residential burglary and Class C theft of property, under § 5-39-201(a)(2), subdivision (b)(2) of this section, and § 5-4-401(a)(3), (4), the residential-burglary and theft-of-property sentences were illegal, and the case was remanded for resentencing. *Wakeley v. State*, 2013 Ark. App. 231, — S.W.3d — (2013).

**Unauthorized Taking.**

Plaintiff may recover under § 16-118-107 where (1) defendants made misrepresentations to plaintiffs with the intent of collecting the commitment fees; and (2) accepting the allegations in the Complaint as true, defendants received the commitment fees with the purpose of depriving plaintiff of its money. *Terra Renewal, LLC v. McCarthy*, — F. Supp. 2d —, 2012 U.S. Dist. LEXIS 94935 (E.D. Ark. July 10, 2012).

**Value.**

Trial court did not err in denying defendant's motion to dismiss two charges for theft of property in excess of \$2,500, in violation of subdivision (b)(1)(A) of this section, on the ground that the charges were barred by the three-year statute of limitations for Class B felonies in § 5-1-109(b)(2) because the amended information was filed within three years of the earliest unauthorized withdrawal from a client's account that was made by defendant, an attorney. *Cameron v. State*, 94 Ark. App. 58, 224 S.W.3d 559 (2006), appeal dismissed, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 496 (Sept. 27, 2007).

Trial court did not err in convicting defendant of theft of property with a value less than \$2,500 but more than \$500 in violation of subdivisions (a)(1) and (b)(2)(A) of this section for stealing merchandise from a department store because a manager's testimony, in conjunction

with the testimony of another employee, who was also a manager, was sufficient to lay the foundation for the introduction of a register receipt under the business-records exception to the hearsay rule, Ark. R. Evid. 803(6), as proof of the value of the stolen merchandise; the employee's testimony indicated that he knew the recovered items were stolen because they did not bear certain labels or electronic receipts that the store regularly places on all merchandise, the manager testified that he knew the value of the stolen merchandise by following the store's standard practice of adding up the value by ringing it up on the store's register, and the receipt bore an electronic date and time stamp, as well as other numeric information about the merchandise, including the label information from each item. *Pace v.*

*State*, 2010 Ark. App. 491, 375 S.W.3d 751 (2010).

State only had to prove that appellant knowingly took another's property to deprive him of the property; simply put, the value of the property stolen is not an element of a theft offense involving a credit or debit card. *Blakely v. State*, 2013 Ark. App. 37, — S.W.3d — (2013).

Defendant's conviction for theft of property as a Class B felony, in violation of subdivision (b)(1)(A) of this section, was supported by the evidence because there was evidence that the car was valued at \$2,500 or more; the car was four years old, and the victim stated that the victim paid \$20,000 for it. *Moore v. State*, 2013 Ark. App. 107, — S.W.3d — (2013).

**Cited:** (decision under prior law). *Hendricks v. State*, 2013 Ark. App. 109, — S.W.3d — (2013).

### 5-36-104. Theft of services.

(a) A person commits theft of services if, with purpose to defraud:

(1) The person purposely obtains a service that he or she knows to be available only for compensation, by deception, threat, or other means to avoid payment for the service; or

(2) Having control over the disposition of a service to which he or she is not entitled, the person purposely diverts the service to his or her own benefit or to the benefit of another person not entitled to the service.

(b) In a circumstance in which payment is ordinarily made immediately upon the rendering of a service, absconding without payment or offer to pay gives rise to a presumption that the actor obtained the service with the purpose of avoiding payment.

(c) Theft of services is a:

(1) Class B felony if:

(A) The value of the service is twenty-five thousand dollars (\$25,000) or more;

(B) The service is obtained by the threat of serious physical injury to any person or destruction of the occupiable structure of another person;

(C) The service is obtained by threat, and the actor stands in a confidential or fiduciary relationship to the person threatened; or

(D) The theft of services involves a theft of a utility service that results in:

(i) Any contamination of a line, pipe, waterline, meter, or other utility property; or

(ii) A spill, dumping, or release of any hazardous material into the environment;

(2) Class C felony if:

(A) The value of the service is less than twenty-five thousand dollars (\$25,000) but more than five thousand dollars (\$5,000); or



(B) The service is obtained by threat; or

(3) Class D felony if the value of the service is five thousand dollars (\$5,000) or less but more than one thousand dollars (\$1,000); or

(4) Class A misdemeanor if the theft of services:

(A) Involves a theft of a utility service that results in the destruction or damage to a line, pipe, waterline, meter, or any other property of the utility; or

(B) Is otherwise committed.

(d)(1) In addition to any other fine that may be levied under § 5-4-201, any person found guilty of theft of services under this section is required to make full restitution to the utility from which the service was obtained if the theft of services involves the theft of a utility service such as a gas, electricity, water, telephone, or cable television service.

(2) For a prosecution brought under this subsection to enable the court to properly fix the amount of restitution, after appropriate investigation the prosecuting attorney shall recommend an amount that would make the utility whole with respect to:

(A) The value of the service received;

(B) The cost of repair of any damage to any:

(i) Line;

(ii) Pipe;

(iii) Waterline;

(iv) Meter; or

(v) Other utility property; and

(C) Any other measurable monetary damage directly related to the offense, including the expense of investigation.

(3) If the defendant disagrees with the recommendation of the prosecuting attorney, he or she is entitled to introduce evidence in mitigation of the amount recommended.

(4) The monetary judgment for restitution, as provided in this section, becomes a judgment against the offender and has the same force and effect as any other civil judgment recorded in this state.

**History.** Acts 1975, No. 280, § 2204; 1977, No. 360, § 9; 1983, No. 719, § 2; A.S.A. 1947, § 41-2204; Acts 1997, No. 518, § 1; 1999, No. 986, § 1; 2011, No. 570, § 24; 2011, No. 1120, § 15.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

**Amendments.** The 2011 amendment

by No. 570 substituted "twenty-five thousand dollars (\$25,000)" for "two thousand five hundred dollars (\$2,500)" in (c)(1)(A) and (c)(2)(A); substituted "five thousand dollars (\$5,000)" for "five hundred dollars (\$500)" in (c)(2)(A); inserted present (c)(3) and redesignated former (c)(3) as (c)(4); and rewrote (c)(4).

The 2011 amendment by No. 1120 inserted the (c)(4)(A) designation and (c)(4)(B).

## CASE NOTES

### Directed Verdict.

Defendant was charged with theft of services for his failure to pay the bail-bond

company \$7,570. The circuit court granted him a directed verdict because the definition of "services" under this section did not

include the services provided by bail-bonding companies; and a future promise to pay for services could not establish the

requisite fraudulent intent. *State v. Williams*, 2013 Ark. 164, — S.W.3d — (2013).

### **5-36-105. Theft of property lost, mislaid, or delivered by mistake.**

#### **CASE NOTES**

##### **Sufficiency of Evidence.**

As the victim exited her truck, a man grabbed her by her neck, put a gun to her head, and asked for her keys; she was forced into her residence and heard a shotgun fire as the man drove away. The police spotted the truck traveling at a high rate of speed apparently in flight from the scene of the crime and defendant's fingerprint was recovered from the doors; the evidence was not sufficient to sustain defendant's conviction for aggravated robbery, theft of property, and criminal mischief because there was no way to determine when defendant touched the

truck. *Turner v. State*, 103 Ark. App. 248, 288 S.W.3d 669 (2008), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 514 (Jan. 22, 2009).

Defendant's conviction for theft of property lost, mislaid, or mistakenly delivered was supported by the evidence because defendant failed to take reasonable measures to return a double payment made to defendant's business on behalf of a customer, and acted with purposeful intent under § 5-2-202(1) of depriving the victims. *Cora v. State*, 2009 Ark. App. 431, 319 S.W.3d 281 (2009).

### **5-36-106. Theft by receiving.**

(a) A person commits the offense of theft by receiving if he or she receives, retains, or disposes of stolen property of another person:

(1) Knowing that the property was stolen; or

(2) Having good reason to believe the property was stolen.

(b) As used in this section, "receiving" means acquiring possession, control, or title or lending on the security of the property.

(c) The following give rise to a presumption that a person knows or believes that property was stolen:

(1) The unexplained possession or control by the person of recently stolen property; or

(2) The acquisition by the person of property for a consideration known to be far below the property's reasonable value.

(d) It is a defense to a prosecution for the offense of theft by receiving that the property is received, retained, or disposed of with the purpose of restoring the property to the owner or another person entitled to the property.

(e) Theft by receiving is a:

(1) Class B felony if the value of the property is twenty-five thousand dollars (\$25,000) or more;

(2) Class C felony if:

(A) The value of the property is less than twenty-five thousand dollars (\$25,000) but more than five thousand dollars (\$5,000); or

(B) The property is a firearm valued at two thousand five hundred dollars (\$2,500) or more;

(3) Class D felony if:



(A) The value of the property is five thousand dollars (\$5,000) or less but more than one thousand dollars (\$1,000);

(B) The property is a:

(i) Credit card or credit card account number;

(ii) Debit card or debit card account number; or

(iii) Firearm valued at less than two thousand five hundred dollars (\$2,500); or

(4) Class A misdemeanor if otherwise committed.

(f) A person convicted of a felony offense under this section is subject to an enhanced sentence of an additional term of imprisonment of five

(5) years at the discretion of the court if the finder of fact finds that the stolen property was nonferrous metal, as it is defined in § 17-44-101.

**History.** Acts 1975, No. 280, § 2206; 1977, No. 360, § 10; 1983, No. 719, § 3; A.S.A. 1947, § 41-2206; Acts 1997, No. 303, § 1; 1997, No. 516, § 3; 2003, No. 838, § 3; 2011, No. 570, § 25; 2013, No. 548, § 1; 2013, No. 1354, § 1.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

**Amendments.** The 2011 amendment substituted "twenty-five thousand dollars (\$25,000)" for "two thousand five hundred

dollars (\$2,500)" in (e)(1); inserted (e)(2) and redesignated the remaining subdivisions accordingly; substituted "Class D" for "Class C" in the introductory paragraph of (e)(3); in (e)(3)(A), substituted "five thousand dollars (\$5,000) or less" for "less than two thousand five hundred dollars (\$2,500)" and "one thousand dollars (\$1,000)" for "five hundred dollars (\$500)"; and deleted (e)(3)(C).

The 2013 amendment by No. 548 added (e)(2)(B); and added (e)(3)(B)(iii).

The 2013 amendment by No. 1354 added (f).

## CASE NOTES

### ANALYSIS

Evidence.

Knowledge and Intent.

Possession.

Sentence.

Value.

### Evidence.

At the time the offense was committed, this section provided that theft by receiving of a credit card was designated as a Class C felony, but theft by receiving of a debit card was not; thus, where the state failed to show that the card was a credit card, there was insufficient evidence to support the conviction for theft by receiving as a Class C felony and defendant's conviction was reduced to a misdemeanor in accordance with subdivision (e)(3) of this section. *Withers v. State*, 93 Ark. App. 276, 218 S.W.3d 386 (2005).

Defendant's conviction for theft by receiving was proper as the evidence established that his companion was in the store

where the victim worked around the time that her credit card was stolen, defendant presented that credit card at a gas station a short time later, and defendant and his companion tried to purchase over \$100 in merchandise. *Henson v. State*, 94 Ark. App. 163, 227 S.W.3d 450 (2006).

Evidence was sufficient to sustain defendant's conviction for theft by receiving because defendant stated that the seller wanted \$275 for several items, including an air compressor, a welder, a crate with several hand tools, and a saw. Defendant also admitted that he knew that the property "either had to be stolen or traded for drugs." *Tryon v. State*, 371 Ark. 25, 263 S.W.3d 475 (2007).

Evidence was sufficient to convict defendant of theft by receiving, because the state presented evidence showing that the VIN numbers of the owner's truck and the truck recovered from the scene were the same, the owner testified that the recovered truck was similar to his own truck,

defendant's fingerprint was on an item found near the truck and he was in photographs found inside the truck, and defendant was observed driving a truck similar to the stolen truck to his storage unit. *Tomboli v. State*, 100 Ark. App. 355, 268 S.W.3d 918 (2007).

Evidence was sufficient to show that defendant committed theft by receiving of the car keys, because defendant conceded the keys belonged to the victim, and the un rebutted evidence showed the stolen keys were found in the car that defendant and his accomplices used for the burglary of the victim's residence. *Lewis v. State*, 2009 Ark. App. 504, 323 S.W.3d 640 (2009).

In a case in which a minor was adjudicated delinquent pursuant to a juvenile court's finding that he committed the criminal offense of misdemeanor theft by receiving, in violation of subsection (a) of this section, the minor unsuccessfully argued that a witness's testimony had to be corroborated. Since the minor had been charged with a misdemeanor, § 16-89-111(e)(1) did not apply. *R.W. v. State*, 2010 Ark. App. 220, — S.W.3d — (2010).

Evidence that defendant had the victim's credit card and driver's license and that he attempted to cash a forged check was sufficient to support his convictions for theft by receiving under this section and forgery under § 5-37-201. *Suggs v. State*, 2010 Ark. App. 571, 377 S.W.3d 461 (2010).

Evidence was sufficient to revoke defendant's suspended imposition of sentence for the underlying crime of theft by receiving where defendant sold a bus for scrap but there was no evidence that indicated how or why defendant came to be in possession of a bus that the owner had reported stolen that same day. *Caldwell v. State*, 2011 Ark. App. 358, — S.W.3d — (2011).

Evidence was sufficient to convict defendant of theft by receiving under subsection (a) of this section because he was found underneath a stolen truck, with a gas tank sitting nearby; and the victim testified that he witnessed defendant working on the vehicle before the police arrived and that the truck had been stripped with the battery and gas tank removed. *Scales v. State*, 2011 Ark. App. 712, — S.W.3d — (2011).

Defendant's conviction for theft by receiving under subdivision (e)(2) of this section was appropriate because his possession of recently stolen property gave rise to the presumption that he knew that the ring was stolen. The jury was not required to believe his explanation that he had found the ring on the ground. *Benton v. State*, 2012 Ark. App. 71, 388 S.W.3d 488 (2012).

Defendant's conviction for theft by receiving, in violation of subsection (a) of this section, was supported by the evidence because a gas station employee identified defendant as the driver of a vehicle only hours after it was stolen. *Turner v. State*, 2012 Ark. App. 150, 391 S.W.3d 358 (2012).

Trial court did not err in revoking defendant's suspended sentences in cases where he pled guilty to forgery and theft by receiving, because the state proved by a preponderance of the evidence that he committed a new offense of theft by receiving under subsection (a) of this section. The complainant testified defendant took his car for a test drive and did not return it; the officer dispatched to the vehicle-theft report testified that defendant handed him the key to the car; and defendant's testimony that he took the car to a mechanic to have the transmission repaired made no sense. *Wallace v. State*, 2012 Ark. App. 571, — S.W.3d — (2012).

### **Knowledge and Intent.**

Where a gun in defendant's possession matched the serial number of a revolver that had been reported missing approximately four months before defendant was found with the gun, a jury was entitled to find, as a matter of fact, that the gun had been "recently stolen," thus giving rise to the statutory presumption that defendant had knowledge of the gun's status as stolen property. *Williams v. State*, 93 Ark. App. 353, 219 S.W.3d 676 (2005).

Evidence was sufficient to sustain a conviction for theft by receiving because defendant was in possession of the stolen property, riding and selling one four-wheeler to her ex-husband prior to it becoming public knowledge that the four-wheelers were stolen, and defendant made statements in her alleged attempt to help the deprived owners locate their property that she wanted revenge on her husband whom she accused of committing



the theft. *Eaton v. State*, 98 Ark. App. 39, 249 S.W.3d 812 (2007).

Because there was no evidence regarding how a gun that was stolen seven or eight months earlier came to be in defendant's possession, the theft was not recent enough to give rise to a presumption that defendant knew it was stolen; therefore, the evidence was insufficient to convict defendant of violating subsection (a) of this section. *Thomas v. Ark.*, 2011 Ark. App. 637, 386 S.W.3d 536 (2011).

### Possession.

Because defendant was unable to explain defendant's possession of property that had been stolen from a neighbor's home the previous day, defendant was properly convicted of violating subsection (a) of this section; consequently, defendant's prior suspensions were properly revoked. *Johnson v. State*, 2011 Ark. App. 718, — S.W.3d — (2011).

### Sentence.

Although defendant's Class C felony conviction for theft by receiving in excess of \$500.00 could not stand, defendant did not challenge the sufficiency of the evidence showing that he was generally guilty of theft by receiving and, as the value of the stolen generator was at most \$499.99, defendant still stood convicted of a Class A misdemeanor; accordingly, his conviction was modified to reflect the maximum sentence for a Class A misdemeanor of one year, with credit for any time defendant had already served. *Russell v. State*, 367 Ark. 557, 242 S.W.3d 265 (2006).

In a case in which a minor was adjudicated delinquent pursuant to the juvenile

court's finding that he committed the criminal offense of misdemeanor theft by receiving, in violation of subsection (a) of this section, the trial court did not err by revoking the minor's probation from a previous adjudication. He was required to obey all state, federal, and municipal laws as a condition of his probation, and substantial evidence supported the trial court's decision to adjudicate him delinquent. *R.W. v. State*, 2010 Ark. App. 220, — S.W.3d — (2010).

### Value.

Because the sales tax should not have been included in computing the value of the generator, and the state failed to prove that the warranty was stolen along with the generator, defendant's Class C felony conviction could not stand; however, defendant did not challenge the sufficiency of the evidence showing that he was generally guilty of theft by receiving and, as the value of the generator was at most \$499.99, defendant still stood convicted of a Class A misdemeanor. *Russell v. State*, 367 Ark. 557, 242 S.W.3d 265 (2006).

Defendant's conviction for theft by receiving, in violation of subdivision (e)(3) of this section, was proper because the State proved that the stolen trailer's value was in excess of \$ 1,000; the owner of a trailer dealership testified that the owner sold the trailer at issue to the victim for \$ 1,475 and even with the damage to the trailer, it would still be worth over \$ 1,000. *Johnson v. State*, 2012 Ark. App. 615, — S.W.3d — (2012).

**Cited:** *Misenheimer v. State*, 100 Ark. App. 189, 265 S.W.3d 764 (2007).

## 5-36-116. Shoplifting.

(a)(1) A person engaging in conduct giving rise to a presumption under § 5-36-102(c) may be detained in a reasonable manner and for a reasonable length of time by a law enforcement officer, merchant, or merchant's employee in order that recovery of a good may be effected.

(2) The detention by a law enforcement officer, merchant, or merchant's employee does not render the law enforcement officer, merchant, or merchant's employee criminally or civilly liable for false arrest, false imprisonment, or unlawful detention.

(b)(1) If sufficient notice has been posted to advise patrons that an antishoplifting or inventory control device is being utilized, the activation of an antishoplifting or inventory control device as a result of a person's exiting an establishment or a protected area within the

establishment constitutes reasonable cause for the detention of the person so exiting by the owner or operator of the establishment or by an agent or employee of the owner or operator.

(2) Any detention under subdivision (b)(1) of this section shall be made only in a reasonable manner and only for a reasonable period of time sufficient for any inquiry into the circumstances surrounding the activation of the antishoplifting or inventory control device or for the recovery of a good.

(3) A detention under subdivision (b)(1) of this section by a law enforcement officer, merchant, or merchant's employee does not render the law enforcement officer, merchant, or merchant's employee criminally or civilly liable for false arrest, false imprisonment, or unlawful detention.

(c) As used in this section, "antishoplifting or inventory control device" means a mechanism or other device designed and operated for the purpose of detecting the removal from a mercantile establishment or similar enclosure or from a protected area within a mercantile establishment or similar enclosure.

(d)(1) Upon probable cause for believing a suspect has committed the offense of shoplifting, a law enforcement officer may arrest the person without a warrant.

(2) The law enforcement officer, merchant, or merchant's employee who has observed the person accused of committing the offense of shoplifting shall provide a written statement that serves as probable cause to justify the arrest.

(3) The accused person shall be brought immediately before a magistrate and afforded an opportunity to make a bond or recognizance as in other criminal cases.

**History.** Acts 1957, No. 50, § 4; 1971, No. 164, § 1; 1975, No. 458, § 1; 1975, No. 928, § 15; 1983, No. 551, § 1; 1985, No. 404, § 1; A.S.A. 1947, § 41-2251; Acts 2005, No. 1994, § 246.

**Publisher's Notes.** This section is being set out to reflect corrections in (a)(1).

### 5-36-120. Theft of motor fuel.

(a) A person commits the offense of theft of motor fuel if the person knowingly operates an automobile or other related vehicle after placing motor fuel in the automobile or other related vehicle at a:

(1) Service station, filling station, garage, or other business where motor fuel is offered for sale at retail, so as to cause the automobile or other related vehicle to leave the premises of the service station, filling station, gasoline station, garage, or any other business where motor fuel is offered for sale at retail, with the intent of depriving the owner of the motor fuel and not making payment for the motor fuel; or

(2) Location owned by a political subdivision or nonprofit entity whether or not the motor fuel is offered for sale at retail, so as to cause the automobile or other related vehicle to leave the premises of the



political subdivision or nonprofit entity, with the intent of depriving the owner of the motor fuel and not making payment for the motor fuel.

(b) Theft of motor fuel is a Class A misdemeanor.

(c)(1)(A) In addition to a penalty in subsection (b) of this section, a person who pleads guilty or nolo contendere to or is found guilty of theft of motor fuel shall have his or her driver's license suspended by the court for a period of not more than six (6) months.

(B) However, if the person's driver's license has previously been suspended for theft of motor fuel the court shall suspend the person's driver's license for not less than one (1) year.

(2)(A) The court shall immediately take possession of any suspended driver's license and forward it to the Office of Driver Services.

(B) The office shall notify the licensee of the suspension and of an opportunity to request a hearing to determine if a restricted permit should be issued during the time of suspension.

(d) Any service station, filling station, garage, or other location where motor fuel is offered for sale at retail shall prominently display on each face of a retail product dispenser a sign that contains the following: "THEFT OF MOTOR FUEL IS A CLASS A MISDEMEANOR AND CARRIES A MAXIMUM PENALTY OF ONE (1) YEAR IN JAIL, \$1000 FINE, AND A ONE (1) YEAR SUSPENSION OF YOUR DRIVER'S LICENSE."

(e) As used in this section:

(1) "Nonprofit entity" means an organization that is exempt from income tax under 26 U.S.C. § 501(a); and

(2) "Political subdivision" means an agency, department, or other governing body of the state.

**History.** Acts 2001, No. 745, § 2; 2005, deleted "under § 27-16-907(a)" following No. 900, § 1; 2011, No. 194, § 9.

**Amendments.** The 2011 amendment

### **5-36-123. Theft of scrap metal.**

(a) A person commits theft of scrap metal if he or she commits, aids, or is an accomplice to a commission of theft of property under § 5-36-103(a) and the property is scrap metal.

(b) Except as provided in subsection (c) of this section, the classification and penalty range for theft of scrap metal is the same as theft of property under § 5-36-103(b).

(c) Upon conviction of a person for theft of scrap metal, the classification and penalty range in § 5-36-103(b) shall be increased one (1) classification if:

(1) The person caused incidental damage to the owner of the scrap metal or the property of the owner of the scrap metal while committing the theft of scrap metal and the costs of incidental damage was more than two hundred fifty dollars (\$250); or

(2) The person transported the scrap metal across state lines to sell or dispose of the scrap metal.

(d) As used in this section:

(1) “Costs of incidental damage” means the total amount of money damages suffered by an owner of scrap metal as a direct result of the theft of the scrap metal, including lost income, lost profits, and costs of repair or replacement of property damage;

(2) “Incidental damage” means loss of income, loss of profit, or property damage; and

(3) “Scrap metal” means copper, copper alloy, copper utility wire, any bronze, or any aluminum as described in § 17-44-101 et seq.

**History.** Acts 2007, No. 630, § 1; 2013, No. 1354, § 2. inserted “aids, or is an accomplice to a commission of” in (a).

**Amendments.** The 2013 amendment

### **5-36-124. Theft by receiving of scrap metal.**

(a) As used in this section:

(1) “Receiving” means acquiring possession, control, or title or lending on the security of the scrap metal; and

(2) “Scrap metal” means copper, copper alloy, copper utility wire, any bronze, or any aluminum as described in § 17-44-101 et seq.

(b) A person commits the offense of theft by receiving of scrap metal if he or she receives, retains, purchases, or disposes of scrap metal of another person and he or she knows or should have known that the scrap metal was stolen.

(c) Theft by receiving of scrap metal is a:

(1) Class A misdemeanor; or

(2) Class D felony if it is a second or subsequent offense of theft by receiving of scrap metal or the value of the scrap metal is more than one thousand dollars (\$1,000).

(d) A person convicted of a felony offense under this section is subject to an enhanced sentence of an additional term of imprisonment of five (5) years at the discretion of the court if the finder of fact finds that the scrap metal was nonferrous metal, as it is defined in § 17-44-101.

**History.** Acts 2011, No. 1193, § 1; 2013, No. 1125, § 8; 2013, No. 1354, §§ 3, 4.

**Amendments.** The 2013 amendment by No. 1125 redesignated former (c)(1) as present (c); deleted former (c)(1)(A), (c)(1)(B), and (c)(2); and inserted present (c)(1) and (c)(2).

The 2013 amendment by No. 1354, in (b), inserted “purchases” and substituted “and he or she knows or should have known” for “knowing”; and added (d).

### **5-36-125. Unlawful transfer of stolen property to a pawn shop or pawnbroker.**

(a) A person commits the offense of unlawful transfer of stolen property to a pawn shop or pawnbroker if he or she sells, pawns, or otherwise transfers an ownership interest in stolen property of another person to a pawn shop or pawnbroker:

(1) Knowing that the property was stolen; or



(2) Having good reason to believe that the property was stolen.

(b) Unlawful transfer of stolen property to a pawn shop or pawnbroker is a:

(1) Class A misdemeanor; or

(2) Class D felony for a second or subsequent offense within five (5) years of a prior offense.

**History.** Acts 2013, No. 1290, § 1.

### SUBCHAPTER 3 — WIRELESS SERVICES THEFT PREVENTION LAW

#### SECTION.

5-36-303. Theft of wireless service.

#### 5-36-303. Theft of wireless service.

(a) A person commits the offense of theft of wireless service if he or she purposely obtains wireless service by the use of an unlawful wireless device or without the consent of the wireless service provider.

(b) Theft of wireless service is a:

(1) Class A misdemeanor if the aggregate value of wireless service obtained is one thousand dollars (\$1,000) or less;

(2) Class D felony if the:

(A) Aggregate value of wireless service obtained is five thousand dollars (\$5,000) or less but more than one thousand dollars (\$1,000); or

(B) Stolen wireless service is used to communicate a threat of damage or injury by bombing, fire, or other means, in a manner likely to:

(i) Place another person in reasonable apprehension of physical injury to himself or herself or another person or of damage to his or her property or to the property of another person; or

(ii) Create a public alarm;

(3) Class C felony if the:

(A) Aggregate value of wireless service is more than five thousand dollars (\$5,000) but less than twenty-five thousand dollars (\$25,000);

(B) Conviction is for a second or subsequent offense; or

(C) Person convicted of the offense has been previously convicted of any similar crime in this or any other state or federal jurisdiction; or

(4) Class B felony if the aggregate value of the wireless service is twenty-five thousand dollars (\$25,000) or more.

**History.** Acts 1997, No. 1310, § 3; 2003, No. 1087, § 25; 2011, No. 570, § 26.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

**Amendments.** The 2011 amendment inserted "wireless" in (a), (b)(2)(A), (b)(2)(B) and (a)(3)(A); substituted "purposely" for "intentionally" in (a); substituted "one thousand dollars (\$1,000)" for "five hundred dollars (\$500)" in (b)(1); substituted "Class D" for "Class C" in the introductory paragraph of (b)(2); rewrote

(b)(2)(A); substituted "Class C" for "Class B" in the introductory paragraph of (b)(3); rewrote (b)(3)(A); and added (b)(4).

## CHAPTER 37

### FORGERY AND FRAUDULENT PRACTICES

#### SUBCHAPTER.

1. GENERAL PROVISIONS.
2. OFFENSES GENERALLY.
3. WORTHLESS CHECKS.
4. CABLE TELEVISION.
5. BUSINESS AND COMMERCIAL OFFENSES GENERALLY.

#### SUBCHAPTER 1 — GENERAL PROVISIONS

#### SECTION.

5-37-101. Definitions.

#### 5-37-101. Definitions.

As used in this chapter:

(1) "Coin machine" means a coin box, turnstile, vending machine, receptacle, or other mechanical or electronic device designed to receive a coin or bill of a certain denomination or token made for that purpose, and in return for the insertion or deposit of the coin, bill, or token, to offer, to provide, to assist in providing, or to permit the acquisition of property or public or private service;

(2) "Credit card" means any instrument or device issued with or without fee by an issuer for use in obtaining money, goods, services, or anything else of value on credit;

(3)(A) "Deception" means:

(i) Creating or reinforcing a false impression, including a false impression of fact, law, value, or intention or other state of mind that the actor does not believe to be true;

(ii) Preventing another person from acquiring information that would affect his or her judgment of a transaction;

(iii) Failing to correct a false impression that the actor knows to be false and that the actor created or reinforced or that the actor knows to be influencing another person to whom the actor stands in a fiduciary or confidential relationship; or

(iv) Failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of property that the actor transfers or encumbers in consideration for the property or service obtained or in order to continue to deprive another person of that other person's property, whether the impediment is or is not valid or is or is not a matter of official record; or

(v) Employing any other scheme to defraud.



(B) As to a person's intention to perform a promise, "deception" shall not be inferred solely from the fact that the person did not subsequently perform the promise.

(C) "Deception" does not include:

(i) Falsity as to a matter having no pecuniary significance; or

(ii) Puffing by a statement unlikely to deceive an ordinary person in the group addressed;

(4) "Electronic cash register" means a device that keeps a register or supporting document by means of an electronic device or computer system designed to record transaction data for the purpose of computing, compiling, or processing retail sales transaction data or a transaction report;

(5) "Enterprise" means any entity of one (1) or more persons, corporate or otherwise, public or private, engaged in business, commercial, professional, industrial, charitable, social, political, or governmental activity;

(6) "Financial institution" means any organization or enterprise held out to the public as a place of deposit of funds or medium of savings;

(7)(A) "Slug" means an object that by virtue of its size, shape, or any other quality is capable of being inserted, deposited, or otherwise used in a coin machine as a substitute for a genuine coin, bill, or token.

(B) The value of a slug is deemed to be the value of the coin, bill, or token for which it is capable of being substituted;

(8) "Transaction data" means information concerning one (1) or more sales transactions, including without limitation the following:

(A) The items purchased by each customer;

(B) The price for each item purchased;

(C) A taxability determination for each item purchased;

(D) A segregated tax amount for each taxed item purchased;

(E) The amount of cash or credit tendered for each purchase;

(F) The net amount returned to the customer in change;

(G) The date and time of the purchase;

(H) The name, address, and identification number of the vendor;  
and

(I) The receipt or invoice number of the transaction;

(9) "Transaction report" means a report that includes without limitation:

(A) The sales, taxes collected, media totals, and discount voids at an electronic cash register that is printed on cash register tape at the end of the day or shift; and

(B) Each action at an electronic cash register that is stored electronically;

(10) "Utter" means to transfer, pass, or deliver or cause to be transferred, passed, or delivered to another person any written instrument, or to attempt to do so;

(11)(A) "Value" means:

(i) The market value of the property or service at the time and place of the offense;

(ii) If the market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense; or

(iii) In the case of a written instrument, other than a written instrument having a readily ascertainable market value:

(a) The amount due and collectible at maturity less any part that has been satisfied if the written instrument constitutes evidence of a debt; or

(b) The greatest amount of economic loss that the owner might reasonably suffer by virtue of the loss of the written instrument if the written instrument is other than evidence of a debt.

(B) If the actor gave consideration for or had a legal interest in the property or service, the amount of the consideration or the value of the interest shall be deducted from the value of the property or service to determine value; and

(12)(A) "Written instrument" means any paper, document, or other material containing written or printed matter or its equivalent.

(B) "Written instrument" includes any money, token, stamp, seal, badge, trademark, retail sales receipt, universal product code label or other evidence or symbol of value, right, privilege, or identification that is capable of being used to the advantage or disadvantage of any person.

**History.** Acts 1975, No. 280, § 2301; A.S.A. 1947, § 41-2301; Acts 1999, No. 1479, § 1; 2013, No. 1076, § 1.

**Amendments.** The 2013 amendment inserted present (4), (8) and (9).

## CASE NOTES

### Utter.

In a first-degree forgery conviction, there was substantial evidence establishing that defendant acted with intent where he repeatedly tried to pass counter-

feit bills at local businesses and offered an individual one of his bills in exchange for twenty dollars. *Taylor v. State*, 94 Ark. App. 21, 223 S.W.3d 80 (2006).

## SUBCHAPTER 2 — OFFENSES GENERALLY

### SECTION.

5-37-201. Forgery.

5-37-203. Defrauding a secured creditor.

5-37-207. Fraudulent use of a credit card or debit card.

5-37-208. Criminal impersonation.

5-37-215. Fraudulently filing a Uniform Commercial Code financing statement.

5-37-216. Defrauding a prospective adoptive parent.

5-37-217. Healthcare fraud.

### SECTION.

5-37-225. Use of false transcript, diploma, or grade report from postsecondary educational institution.

5-37-226. Filing instruments affecting title or interest in real property.

5-37-227. Financial identity fraud — Nonfinancial identity fraud — Restitution — Venue.



**A.C.R.C. Notes.** For codification of Acts 2011, No. 697, § 1, see § 5-37-216.

**Effective Dates.** Acts 2011, No. 172, § 2: Mar. 4, 2011. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the filing of false liens by persons for vengeful reasons has become a large problem in these United States; that currently Arkansas has inadequate statutes to address this growing problem; and that this act is immediately necessary because citizens as well as persons engaged in law enforcement and the judiciary need immediate protection. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the

Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2013, No. 1499, § 5: July 1, 2013. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the oversight and audit of the state's Medicaid program is essential to its continued operation; that the creation of the Office of the Medicaid Inspector General will ensure that fraud, waste, and abuse are found in a timely manner; and that this act is necessary to ensure that state and federal monies are not misspent. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July, 1, 2013."

### 5-37-201. Forgery.

(a) A person forges a written instrument if, with purpose to defraud, the person makes, completes, alters, counterfeits, possesses, or utters any written instrument that purports to be or is calculated to become or to represent if completed the act of:

- (1) A person who did not authorize that act;
- (2) A fictitious person; or
- (3) A person who authorized an act that was not authorized by law.

(b) A person commits forgery in the first degree if he or she forges a written instrument that is:

- (1) Money, a security, a postage or revenue stamp, or other instrument issued by a government; or
- (2) A stock, bond, or similar instrument representing an interest in property or a claim against a corporation or its property.

(c) A person commits forgery in the second degree if he or she forges a written instrument that is:

- (1) A deed, will, codicil, contract, assignment, check, commercial instrument, credit card, or other written instrument that does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status;

- (2) A public record, or an instrument filed or required by law to be filed, or an instrument legally entitled to be filed in a public office or with a public servant; or

- (3) A written instrument officially issued or created by a public office, public servant, or government agent.

(d) Forgery in the first degree is a Class B felony.

(e) Forgery in the second degree is a Class C felony.

**History.** Acts 1975, No. 280, § 2302; A.S.A. 1947, § 41-2302; Acts 2013, No. 1515, § 1.

**Amendments.** The 2013 amendment rewrote (a).

## CASE NOTES

### ANALYSIS

Applicability.  
Acts Constituting Forgery.  
Evidence.  
Sentence.

#### Applicability.

Plaintiffs pleaded a facially plausible claim under § 16-118-107 where they alleged that the January patient notification letter defendants sent out could reasonably be construed as representing that plaintiffs were abandoning their patients or that defendants were terminating the physician-patient relationship between plaintiffs and the office's patients, the letter arguably constituted a written instrument that did or may have evidenced, created, transferred, terminated, or otherwise affected a legal right, interest, obligation, or status under this section. *Murphy v. LCA-Vision, Inc.*, 776 F. Supp. 2d 886, 2011 U.S. Dist. LEXIS 22156 (E.D. Ark. Mar. 4, 2011).

#### Acts Constituting Forgery.

Defendant's attempt to pass a victim's stolen check at a store completed defendant's commission of second-degree forgery, in violation of subdivision (c)(1) of this section; indeed, defendant testified that defendant "tried giving the check" to the cashier. *Turner v. State*, 2012 Ark. App. 150, 391 S.W.3d 358 (2012).

#### Evidence.

Evidence was sufficient to sustain a forgery conviction where defendant made a statement to the police admitting that he had been engaged in a forgery scheme and that his price for forged checks varied according to the amount of the check. *Dendy v. State*, 93 Ark. App. 281, 218 S.W.3d 322 (2005).

In a first-degree forgery conviction, there was substantial evidence establishing that defendant acted with intent where he (1) repeatedly tried to pass counterfeit bills at local businesses and (2) offered an individual one of his bills in exchange for twenty dollars. *Taylor v.*

*State*, 94 Ark. App. 21, 223 S.W.3d 80 (2006).

Evidence was sufficient to sustain defendant's forgery and theft convictions where she did not offer a reasonable explanation of how she acquired the forged check; therefore, an inference that she committed the forgery or was an accessory to its commission was warranted and the court did not err in inferring defendant's intent. *DeShazer v. State*, 94 Ark. App. 363, 230 S.W.3d 285 (2006).

Where the state failed to prove that the check was issued or presented for payment prior to the closure of the bank account upon which it was drawn, the trial court could not reasonably infer that the check was forged; therefore, the trial court erred in finding that defendant violated the terms of her probation by passing a forged instrument. *Bedford v. State*, 96 Ark. App. 38, 237 S.W.3d 516 (2006).

There was sufficient evidence to support appellants' convictions for second-degree forgery where appellants possessed not only checks bearing the names of the victims, but also a credit card and driver's license in one victim's name, the license bearing one of appellant's picture. *Anderson v. State*, 2009 Ark. App. 804, 372 S.W.3d 385 (2009).

Evidence that defendant had the victim's credit card and driver's license and that he attempted to cash a forged check was sufficient to support his convictions for theft by receiving under § 5-36-106 and forgery under this section. *Suggs v. State*, 2010 Ark. App. 571, 377 S.W.3d 461 (2010).

Defendant's conviction for second-degree forgery under subsection (e) of this section was proper considering accomplice testimony along with the other evidence. Although the evidence was circumstantial given that it was the accomplice, rather than defendant, who cashed the forged check, circumstantial evidence could provide the basis to support the conviction. *Benton v. State*, 2012 Ark. App. 71, 388 S.W.3d 488 (2012).

Evidence was sufficient to convict appellant of first-degree-forgery under this sec-



tion because she applied for a job using another woman's name and documents, she signed the other woman's name on the federal forms required for her application, and she intended to defraud and was not authorized to use the other woman's name and personal information. *Barron-Gonzalez v. State*, 2013 Ark. App. 120, — S.W.3d — (2013).

#### **Sentence.**

Revocation of a defendant's probation on an underlying charge of forgery in the

second degree was supported by a preponderance of the evidence: defendant admitted to more than one violation of defendant's probation and a judge was not required to believe defendant's explanations or excuse defendant's failure to comply with the conditions of defendant's probation. *Ingram v. State*, 2009 Ark. App. 729, 363 S.W.3d 6 (2009).

### **5-37-203. Defrauding a secured creditor.**

(a)(1) A person commits the offense of defrauding a secured creditor in the first degree if he or she destroys, removes, cancels, encumbers, transfers, or otherwise disposes of property subject to a security interest with the purpose to hinder enforcement of the security interest.

(2) Defrauding a secured creditor in the first degree is a Class D felony.

(b)(1) A person commits the offense of defrauding a secured creditor in the second degree if he or she uses motor vehicle insurance policy proceeds in excess of one thousand dollars (\$1,000) obtained from a settlement of a property damage claim on a motor vehicle subject to a security interest in contravention of the security agreement that creates or provides for the security interest in the motor vehicle.

(2) Defrauding a secured creditor in the second degree is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2304; A.S.A. 1947, § 41-2304; Acts 2009, No. 485, § 1.

**Amendments.** The 2009 amendment

inserted (b), redesignated former (a) and (b) as (a)(1) and (a)(2), and inserted "in the first degree" in (a)(1) and (a)(2).

### **5-37-207. Fraudulent use of a credit card or debit card.**

(a) A person commits the offense of fraudulent use of a credit card or debit card, if with purpose to defraud, he or she uses a credit card, credit card account number, debit card, or debit card account number to obtain property or a service with knowledge that:

(1) The credit card, credit card account number, debit card, or debit card account number is stolen;

(2) The credit card, credit card account number, debit card, or debit card account number has been revoked or cancelled;

(3) The credit card, credit card account number, debit card, or debit card account number is forged; or

(4) For any other reason his or her use of the credit card, credit card account number, debit card, or debit card account number is unauthorized by either the issuer or the person to whom the credit card or debit card is issued.

(b) Fraudulent use of a credit card or debit card is a:

(1) Class B felony if the value of all moneys, goods, or services obtained during any six-month period is twenty five thousand dollars (\$25,000) or more;

(2) Class C felony if the value of all moneys, goods, or services obtained during any six-month period is less than twenty five thousand dollars (\$25,000) but more than five thousand dollars (\$5,000);

(3) Class D felony if the value of all moneys, goods, or services obtained during any six-month period is five thousand dollars (\$5,000) or less but more than one thousand dollars (\$1,000); or

(4) Class A misdemeanor if the value of all moneys, goods, or services obtained during any six-month period is one thousand dollars (\$1,000) or less.

**History.** Acts 1975, No. 280, § 2308; A.S.A. 1947, § 41-2308; Acts 1997, No. 516, § 4; 2001, No. 1142, § 1; 2011, No. 570, § 27.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement compre-

hensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

**Amendments.** The 2011 amendment rewrote (b)(1) and (b)(2); and added (b)(3) and (b)(4).

## RESEARCH REFERENCES

**ALR.** Criminal Liability for Unauthorized Use of Credit Card under State Credit Card Statutes. 68 A.L.R.6th 527.

## CASE NOTES

### Evidence.

Evidence was sufficient to support a conviction for fraudulent use of a credit card under this section where company representatives stated that defendant was not authorized to use the card, and defendant made inconsistent statements as to why he was purchasing gasoline with the card. The fact that defendant paid for the gasoline himself did not erase his attempt to use the card. *Lee v. State*, 102 Ark. App. 23, 279 S.W.3d 496 (2008).

While defendant worked for the sheriff's department, she was authorized to use the department's credit card only for county purchases; her use of the card for personal purchases was sufficient to support her conviction for fraudulently using a credit card in violation of subdivision (a)(4) of this section. *Baker v. State*, 2009 Ark. App. 788, — S.W.3d — (2009).

## 5-37-208. Criminal impersonation.

(a)(1) A person commits criminal impersonation in the first degree if, with the purpose to induce a person to submit to pretended official authority for the purpose to injure or defraud the person, the person:

(A) Pretends to be a law enforcement officer by wearing or displaying, without authority, any uniform or badge by which a law enforcement officer is lawfully distinguished; or

(B) Uses a motor vehicle or motorcycle designed, equipped, or marked so as to resemble a motor vehicle or motorcycle belonging to a federal, state, or local law enforcement agency.



(2) Criminal impersonation in the first degree is a Class D felony.

(b)(1) A person commits criminal impersonation in the second degree if the person does an act in his or her pretended or assumed capacity or character with the purpose to injure, defraud, harass, or intimidate another person and the actor:

(A) Assumes a false identity;

(B) Pretends to be a representative of a person or organization;

(C) Pretends to be an officer or employee of the government other than a law enforcement officer described in subsection (a) of this section;

(D) Pretends that he or she is a law enforcement officer when the person is not a law enforcement officer; or

(E) Pretends to have a handicap or disability.

(2) Criminal impersonation in the second degree is a:

(A) Class D felony if:

(i) The victim of the offense is an animal owner; and

(ii) An animal of the owner is seized as a result of the offense; or

(B) Class A misdemeanor if otherwise committed.

(c) As used in this section:

(1) “Animal” means the same as defined in § 5-62-102; and

(2) “Owner” means the same as defined in § 5-62-102.

**History.** Acts 1975, No. 280, § 2310; A.S.A. 1947, § 41-2310; Acts 1991, No. 786, § 3; 1997, No. 1014, § 1; 2013, No. 433, § 1; 2013, No. 1178, § 1.

**Amendments.** The 2013 amendment by No. 433 substituted “defraud, harass, or intimidate” for “or defraud” in (b)(1);

inserted present (b)(1)(D); and redesignated former (b)(1)(D) as (b)(1)(E).

The 2013 amendment by No. 1178 inserted (b)(2)(A); added “if otherwise committed” to the end of (b)(2)(B); and added (c).

### **5-37-215. Fraudulently filing a Uniform Commercial Code financing statement.**

(a) As used in this section:

(1) “Financing statement” means the same as defined in § 4-9-102(a)(39); and

(2) “Security agreement” means the same as defined in § 4-9-102(a)(74).

(b) A person commits the offense of fraudulently filing a Uniform Commercial Code financing statement if, with the purpose to defraud or harass an alleged debtor or any other person, the person knowingly presents or conspires with another person to present a financing statement under the Uniform Commercial Code, § 4-1-101 et seq., for filing that the person knows:

(1) Is not based on a bona fide security agreement; or

(2) Was not authorized or authenticated by the alleged debtor identified in the financing statement or an authorized representative of the alleged debtor.

(c)(1) Fraudulently filing a Uniform Commercial Code financing statement is a Class A misdemeanor.

(2)(A) A subsequent offense of fraudulently filing a Uniform Commercial Code financing statement is a Class D felony.

(B)(i) Subdivision (c)(2)(A) of this section includes a subsequent offense by a defendant who has previously pleaded guilty or nolo contendere to or been found guilty of an equivalent penal law of another state or foreign jurisdiction or an equivalent penal federal law.

(ii) The trial judge shall determine whether the defendant has previously pleaded guilty or nolo contendere to or been found guilty of an equivalent penal law in another state or foreign jurisdiction or an equivalent penal federal law based on certified records of the previous offense.

(d) In addition to the criminal penalties provided under subsection (c) of this section and in addition to any other laws under which a person may obtain relief, a person aggrieved or damaged by the filing of a Uniform Commercial Code financing statement in violation of subsection (b) of this section has a civil cause of action against the defendant for injunctive and other curative relief and may also recover:

(1) The greater of ten thousand dollars (\$10,000) or the actual damages caused by the violation;

(2) Court costs;

(3) Reasonable attorney's fees;

(4) Costs and expenses reasonably related to the expenses of investigating and bringing the civil action; and

(5) Exemplary or punitive damages in an amount determined by the fact finder.

**History.** Acts 2009, No. 336, § 1.

### **5-37-216. Defrauding a prospective adoptive parent.**

(a) As used in this section:

(1) "Aggregate financial benefit" means the total financial benefit received by a person preceding, during, and after the pregnancy of the person;

(2) "Financial benefit" means any cost for prenatal, delivery, or postnatal care, including without limitation reasonable costs for:

(A) Housing;

(B) Food;

(C) Clothing;

(D) Medical expenses; or

(E) General maintenance; and

(3) "Prospective adoptive parent" means a person who through his or her actions has a stated or unstated intention to begin the process of adopting a minor, whether or not the minor is known to him or her.

(b) A person commits the offense of defrauding a prospective adoptive parent if he or she:

(1) Knowingly obtains a financial benefit from a prospective adoptive parent or from an agent of a prospective adoptive parent with a purpose



to defraud the prospective adoptive parent or the agent of the prospective adoptive parent of the financial benefit; and

(2) Does not:

(A) Consent to the adoption; or

(B) Complete the adoption process.

(c) Defrauding a prospective adoptive parent is a:

(1) Class B felony if:

(A) The aggregate financial benefit is two thousand five hundred dollars (\$2,500) or more; or

(B) The person has previously been convicted under this section;

(2) Class C felony if the aggregate financial benefit is five hundred dollars (\$500) or more but less than two thousand five hundred dollars (\$2,500); or

(3) Class A misdemeanor if the aggregate financial benefit is less than five hundred dollars (\$500).

**History.** Acts 2011, No. 697, § 1.

However, pursuant to § 1-2-303, the section

**A.C.R.C. Notes.** Acts 2011, No. 697,

tion was redesignated as § 5-37-216.

§ 1, created a new offense at § 5-26-204.

### 5-37-217. Healthcare fraud.

(a) A person commits healthcare fraud if with a purpose to defraud a health plan:

(1) The person knowingly provides materially false information or omits material information for the purpose of requesting payment from a single health plan for a health care item or service; and

(2) As a result of the materially false information or omission of material information, a person receives payment in an amount that the person is not entitled to under the circumstances.

(b)(1) Healthcare fraud is a Class A misdemeanor.

(2) However, if on one (1) or more occasions, the payment or portion of the payment wrongfully received from a single health plan in a period of not more than one (1) year exceeds:

(A) Ten thousand dollars (\$10,000) in the aggregate, healthcare fraud is a Class D felony;

(B) Twenty-five thousand dollars (\$25,000) in the aggregate, healthcare fraud is a Class C felony;

(C) Fifty thousand dollars (\$50,000) in the aggregate, healthcare fraud is a Class B felony; or

(D) One million dollars (\$1,000,000) in the aggregate, healthcare fraud is a Class A felony.

(c) It is an affirmative defense to prosecution under this section that the defendant was a clerk, bookkeeper, or other employee other than an employee charged with the active management and control in an executive capacity of the affairs of the corporation who executed the orders of his or her employer or of a superior employee generally authorized to direct his or her activities.

**History.** Acts 2013, No. 1499, § 1.

**5-37-225. Use of false transcript, diploma, or grade report from postsecondary educational institution.**

(a) No person may falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or knowingly aid or assist in falsely making, forging, or counterfeiting a transcript, diploma, or grade report of a postsecondary educational institution.

(b) No person may use, offer, or present as genuine a false, forged, counterfeited, or altered transcript, diploma, or grade report of a postsecondary educational institution.

(c) No person may use, offer, or present a transcript, diploma, or grade report of a postsecondary educational institution in a fraudulent manner.

(d) A person who violates any provision of this section is guilty of a Class A misdemeanor.

**History.** Acts 1991, No. 351, §§ 1, 2; 2005, No. 1994, § 345; 2007, No. 827, § 40.

**5-37-226. Filing instruments affecting title or interest in real property.**

(a) It is unlawful for a person with the knowledge of the instrument's lack of authenticity or genuineness to have placed of record in the office of the county recorder or the office of the Secretary of State any instrument:

(1) Clouding or adversely affecting:

(A) The title or interest of the true owner, lessee, or assignee in real property; or

(B) Any bona fide interest in real property; and

(2) With the purpose of:

(A) Clouding, adversely affecting, impairing, or discrediting the title or other interest in the real property which may prevent the true owner, lessee, or assignee from disposing of the real property or transferring or granting any interest in the real property; or

(B) Procuring money or value from the true owner, lessee, or assignee to clear the instrument from the records of the office of the county recorder or the office of the Secretary of State.

(b)(1)(A) A person who violates subsection (a) of this section is guilty of a Class A misdemeanor.

(B) Except as provided under subdivision (b)(2) of this section, a person who has a previous conviction under this section upon conviction is guilty of a Class D felony for a subsequent violation of subsection (a) of this section.

(2) However, a person who violates subsection (a) of this section is guilty of a Class C felony if the person violates subsection (a) of this



section because of the performance of official duties by the victim and the victim is:

- (A) A judge or other court personnel;
- (B) A prosecuting attorney or deputy prosecuting attorney;
- (C) A state, county, or municipal law enforcement officer or jailer;
- (D) An employee of the Department of Correction;
- (E) An employee of the Department of Community Correction;
- (F) A judge, prosecuting attorney, deputy prosecuting attorney, law enforcement officer, or jailer from another state, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States;
- (G) A person elected to a federal, state, or local position; or
- (H) A person employed by the Attorney General.

(c) An owner, lessee, or assignee of real property located in the State of Arkansas who suffers loss or damages as a result of conduct that is prohibited under subsection (a) of this section and who must bring civil action to remove any cloud from his or her title or interest in the real property or to clear his or her title or interest in the real property is entitled to three (3) times actual damages, punitive damages, and costs, including any reasonable attorney’s fees or other costs of litigation reasonably incurred.

(d) This section does not apply to a bona fide filing of lis pendens, materialmen’s lien, laborer’s lien, or other legitimate notice or protective filing as provided by law.

**History.** Acts 1995, No. 1086, §§ 1-3; 2011, No. 172, § 1; 2013, No. 1125, § 9.

**Amendments.** The 2011 amendment substituted “county recorder or the office of the Secretary of State” for “recorder of any county” in the introductory language of (a); substituted “purpose” for “intent” in the introductory language of (a)(2); in

(a)(2)(B), inserted “county” and “or the office of the Secretary of State”; inserted (b)(1)(B) and (b)(2).

The 2013 amendment, in (b)(1)(B), substituted “Except as provided under subdivision (b)(2) of this section, a” for “A” and deleted “subdivision (b)(1)(A) of” following “conviction under.”

CASE NOTES

ANALYSIS

In General.  
Equitable Relief.  
Evidence.

**In General.**

Property owners who failed to make mortgage payments in apparent confusion over unmade withdrawals from their checking account failed to state a claim for relief against the loan servicing agent, which had not violated this section in filing a bona fide foreclosure action. *Quinn v. Ocwen Fed. Bank FSB*, 470 F.3d 1240 (8th Cir. 2006).

**Equitable Relief.**

As lessors suit the lessee, alleging it violated this section and § 15-73-204, and attacking the validity of the lease, they could not thereafter complain that the lessee failed to fulfill its lease obligations. Therefore, the lessee’s was entitled to equitable relief by being allowed to suspend its drilling obligations while the suit was pending. *Snowden v. JRE Invs.*, 2010 Ark. 276, 370 S.W.3d 215 (2010).

**Evidence.**

Where the owner of a construction company testified that the company had performed work on the project on June 23,

2003, and on unspecified dates in August 2003, and the lien was filed on October 20, 2003, substantial evidence existed to find that the company did not file its lien with knowledge that it had not worked on the project within 120 days before the lien was filed. *Swink v. Lasiter Constr., Inc.*, 94 Ark. App. 262, 229 S.W.3d 553 (2006).

Trial court did not err in awarding an individual punitive damages and attorney fees under subsection (c) of this section, and although the trial court did not make a finding that the instrument was filed with knowledge that it was not genuine or authentic, such a finding was implicit when the court awarded punitive damages under the statute, and the findings were supported by the evidence that the

company prepared quitclaim deeds to the entire 40 acres, despite one acre having been carved out, the company was a shell company, and there were no revenue stamps on the deeds under § 26-60-110(b), and the letter attached to the individual's complaint implied that the company was seeking money from the individual in order to clear his title; because the award was based on a statutory remedy, the trial court could have awarded punitive damages without first having awarded compensatory damages. *J. Michael Enters. v. Oliver*, 101 Ark. App. 48, 270 S.W.3d 388 (2007), review denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 272 (Apr. 24, 2008).

### **5-37-227. Financial identity fraud — Nonfinancial identity fraud — Restitution — Venue.**

(a) A person commits financial identity fraud if, with the purpose to:

(1) Create, obtain, or open a credit account, debit account, or other financial resource for his or her benefit or for the benefit of a third party, he or she accesses, obtains, records, or submits to a financial institution another person's identifying information for the purpose of opening or creating a credit account, debit account, or financial resource without the authorization of the person identified by the information; or

(2) Appropriate a financial resource of another person to his or her own use or to the use of a third party without the authorization of that other person, the actor:

(A) Uses a scanning device; or

(B) Uses a re-encoder.

(b) A person commits nonfinancial identity fraud if he or she knowingly obtains another person's identifying information without the other person's authorization and uses the identifying information for any unlawful purpose, including without limitation:

(1) To avoid apprehension or criminal prosecution;

(2) To harass another person; or

(3) To obtain or to attempt to obtain a good, service, real property, or medical information of another person.

(c) As used in this section:

(1) "Disabled person" means the same as defined in § 4-88-201;

(2) "Elder person" means the same as defined in § 4-88-201;

(3) "Financial institution" includes, but is not limited to, a credit card company, bank, or any other type of lending or credit company or institution;

(4) "Financial resource" includes, but is not limited to, a credit card, debit card, or any other type of line of credit or loan;

(5) "Identifying information" includes, but is not limited to, a:

(A) Social security number;



- (B) Driver's license number;
- (C) Checking account number;
- (D) Savings account number;
- (E) Credit card number;
- (F) Debit card number;
- (G) Personal identification number;
- (H) Electronic identification number;
- (I) Digital signature; or

(J) Any other number or information that can be used to access a person's financial resources;

(6) "Re-encoder" means an electronic device that places encoded information from the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different card; and

(7) "Scanning device" means a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card.

(d) The provisions of this section do not apply to any person who obtains another person's driver's license or other form of identification for the sole purpose of misrepresenting the actor's age.

(e)(1) Except as provided in subdivision (e)(2) of this section, financial identity fraud is a Class C felony.

(2) Financial identity fraud is a Class B felony if the victim is an elder person or a disabled person.

(f)(1) Except as provided in subdivision (f)(2) of this section, nonfinancial identity fraud is a Class D felony.

(2) Nonfinancial identity fraud is a Class C felony if the victim is an elder person or a disabled person.

(g)(1) In addition to any penalty imposed under this section, a violation of this section constitutes an unfair or deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(2) Any remedy, penalty, or authority granted to the Attorney General or another person under the Deceptive Trade Practices Act, § 4-88-101 et seq., is available to the Attorney General or that other person for the enforcement of this section.

(h)(1)(A) In addition to any penalty imposed under this section, upon conviction for financial identity fraud or nonfinancial identity fraud, a court may order the defendant to make restitution to any victim whose identifying information was appropriated or to the estate of the victim under § 5-4-205.

(B) In addition to any other authorized restitution, the restitution order described in subdivision (h)(1)(A) of this section may include without limitation restitution for the following financial losses:

(i) Any costs incurred by the victim in correcting the credit history or credit rating of the victim; and

(ii) Any costs incurred in connection with any civil or administrative proceeding to satisfy any debt, lien, or other obligation resulting from the theft of the victim's identifying information, including lost wages and attorney's fees.

(C) The court also may order restitution for financial loss to any other person or entity that suffers a financial loss from a violation of subsection (a) or (b) of this section.

(2) A judgment entered under this section and § 5-4-205 does not bar a remedy available in a civil action to recover damages relating to financial identity fraud or nonfinancial identity fraud.

(i) Venue for any criminal prosecution under this section or any civil action to recover damages relating to financial identity fraud or nonfinancial identity fraud is proper in any of the following venues:

- (1) In the county where the violation occurred;
- (2) If the violation was committed in more than one (1) county, or if the elements of the offense were committed in more than one (1) county, then in any county where any violation occurred or where an element of the offense occurred;
- (3) In the county where the victim resides; or
- (4) In the county where property that was fraudulently used or attempted to be used was located at the time of the violation.

**History.** Acts 1999, No. 568, § 1; 1999, No. 1578, § 1; 2005, No. 280, § 1; 2005, No. 1018, § 1; 2007, No. 85, § 1; 2009, No. 748, § 20.

**Amendments.** The 2009 amendment substituted “purpose” for “intent” in the introductory language of (a).

5-37-228. Identity theft passport.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General As-

sembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

SUBCHAPTER 3 — WORTHLESS CHECKS

SECTION.	SECTION.
5-37-301. Title.	5-37-305. Penalties.
5-37-303. Notice.	5-37-307. Knowingly issuing worthless
5-37-304. Evidence against maker or drawer.	check.

5-37-301. Title.

This subchapter shall be known and may be cited as the “Arkansas Hot Check Law”.

**History.** Acts 1959, No. 241, § 1; A.S.A. 1947, § 67-719; Acts 2009, No. 748, § 21.

**Amendments.** The 2009 amendment rewrote the section.

CASE NOTES

**Sentencing.**  
Upon the revocation of defendant’s proba-  
tion for eight violations of the Arkansas  
Hot Check Law under this section, the

trial court was authorized under subdivi-  
sion (d)(2) of this section and § 5-4-  
309(f)(1)(A) to modify the original order  
and impose multiple sentences of impris-



onment to be served consecutively in accordance with § 5-4-403(a). The trial court did not err by sentencing defendant to twenty years in prison each on four hot-check counts to run consecutively and ten years in prison each on the other felony hot-check counts to run concurrently. Maldonado v. State, 2009 Ark. 432, — S.W.3d — (2009).

5-37-303. Notice.

- (a) For purposes of this section and § 5-37-304, notice that payment was refused by the drawee for lack of funds shall be sent by certified mail, registered mail evidenced by return receipt, or by regular mail supported by an affidavit of mailing, to the address printed on the instrument or given at the time of issuance or to the current residence.
- (b)(1) The form of the notice under subsection (a) of this section shall be substantially as follows:

“You are hereby notified that the check(s) or instrument(s) listed below (has) (have) been dishonored. Pursuant to Arkansas law, you have ten (10) days from receipt of this notice to tender payment of the total amount of the check(s) or instrument(s), plus the applicable service charge(s) of \$ \_\_\_\_\_ (not to exceed \$30.00 per check), plus the amount of any fees charged by any financial institution as a result of the check’s not being honored, the total amount due being \$ \_\_\_\_\_. Unless this amount is paid in full within the time specified above, the dishonored check(s) or instrument(s) and all other available information relating to this incident may be turned over to the prosecuting attorney for criminal prosecution.

CHECK NO.	CHECK DATE	CHECK AMOUNT	NAME OF BANK
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____”

- (2) If notice is sent by an affidavit of mailing, the affidavit of mailing shall contain a copy of the notice and shall substantially state:

“Affidavit of Mailing

I am over the age of eighteen (18) years and on \_\_\_\_\_ (date), I mailed notice of insufficient funds under Arkansas Code § 5-37-303 to the addressee set forth below in an official depository under the exclusive care and custody of the United States Postal Service in \_\_\_\_\_ (city, county, state), addressed as follows:

\_\_\_\_\_  
(name and address of addressee).

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Notary)

\_\_\_\_\_”

- (c) Any party holding a dishonored check or instrument and giving notice in substantially similar form to that provided in subsection (b) of

this section and in the manner provided in subsection (a) of this section is immune from civil liability and criminal liability if sent in good faith for the giving of the notice and for proceeding under the forms of the notice.

**History.** Acts 1959, No. 241, § 4; 1981, No. 899, § 3; 1983, No. 473, § 1; A.S.A. 1947, § 67-722; Acts 1987, No. 678, § 1; 1992 (1st Ex. Sess.), No. 44, § 1; 1995, No. 335, § 2; 2001, No. 996, § 2; 2003, No. 1732, § 1; 2011, No. 1012, § 2.

**Amendments.** The 2011 amendment, in (b)(1), inserted “under subsection (a) of this section” and substituted “\$30.00” for “\$25.00.”

### **5-37-304. Evidence against maker or drawer.**

(a) For purposes of this section, it is prima facie evidence that the maker or drawer intended to defraud and knew at the time of the making, drawing, uttering, or delivering that the check, draft, order, or other form of presentment involving transmission of account information would not be honored if:

(1) The maker or drawer had no account with the drawee at the time the check, draft, order, or other form of presentment involving transmission of account information was made, drawn, uttered, or delivered;

(2) The check, draft, order, or other form of presentment involving transmission of account information bears the endorsement or stamp of a collecting bank indicating that the instrument or transmission was returned or otherwise dishonored because of insufficient funds to cover the value; or

(3) Payment was refused by the drawee for lack of funds, upon presentation within thirty (30) days after delivery, and the maker or drawer has not paid the holder the amount due, together with a service charge not to exceed thirty dollars (\$30.00), plus the amount of any fees charged to the holder of the check, draft, order, or other form of presentment involving transmission of account information by a financial institution as a result of the check, draft, order, or other form of presentment involving transmission of account information not being honored, within ten (10) days after receiving written notice that payment was refused upon the check, draft, order, or other form of presentment involving transmission of account information.

(b)(1) A prosecuting attorney may file charges immediately after the check, draft, order, or other form of presentment involving the transmission of account information has been returned.

(2) The prosecuting attorney may collect restitution, including a service charge, not exceeding thirty dollars (\$30.00) per check, draft, order, or other form of presentment involving the transmission of account information plus the amount of any fees charged to the holder of the check, draft, order, or other form of presentment involving the transmission of account information by a financial institution as a result of the check's, draft's, order's, or other forms of presentment involving the transmission of account information's not being honored,



for the payees of the check, draft, order, or other form of presentment involving the transmission of account information.

(c) The check, draft, order, or other form of presentment involving the transmission of account information bearing an “insufficient” stamp or “no account” stamp from the collecting bank or any other report or stamp from the collecting bank indicating that the check, draft, order, or other form of presentment involving the transmission of account information was dishonored or unable to be paid due to insufficient funds on deposit to cover the value of the check, draft, order, or other form of presentment involving the transmission of account information shall be received as evidence that there were insufficient funds or no account at trial in any court in this state.

(d) Nothing in this section is deemed to abrogate a defendant’s right of cross-examination of a banking official if notice of intention to cross-examine is given ten (10) days prior to the date of hearing or trial.

**History.** Acts 1959, No. 241, § 4; 1981, No. 899, § 3; 1983, No. 473, § 1; A.S.A. 1947, § 67-722; Acts 1987, No. 678, § 1; 1992 (1st Ex. Sess.), No. 44, § 2; 1995, No. 335, § 3; 2001, No. 996, § 3; 2001, No. 1466, § 2; 2011, No. 1012, §§ 3, 4; 2013, No. 1125, § 10.

rewrote (a)(3); and substituted “thirty dollars (\$30.00)” for “twenty-five dollars (\$25.00)” in (b)(2).

The 2013 amendment rewrote (b)(1) and (b)(2); and, in (c), deleted “or” following “check, draft” and inserted “or other form of presentment involving the transmission of account information.”

**Amendments.** The 2011 amendment

## 5-37-305. Penalties.

(a) Upon a determination of guilt of a person under § 5-37-302, in the event that the order, draft, check, or other form of presentment involving the transmission of account information is one thousand dollars (\$1,000) or less, the penalties shall be as follows:

(1) For a first offense, the person is guilty of an unclassified misdemeanor and shall receive a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500) or imprisonment in the county jail or regional detention facility not to exceed thirty (30) days, or both;

(2) For a second offense, the person is guilty of an unclassified misdemeanor and shall receive a fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) or imprisonment in the county jail or regional detention facility not to exceed ninety (90) days, or both; and

(3) For a third or subsequent offense, the person is guilty of an unclassified misdemeanor and shall receive a fine of not less than two hundred dollars (\$200) nor more than two thousand dollars (\$2,000) or imprisonment in the county jail or regional detention facility not to exceed one (1) year, or both.

(b)(1) Making, uttering, or delivering one (1) or more instruments or transactions drawn on insufficient funds or drawn on a nonexistent account is a Class B felony if:

(A) The amount of any one (1) instrument or transaction is twenty-five thousand dollars (\$25,000) or more; or

(B) More than one (1) instrument or transaction has been drawn within a ninety-day period, each instrument or transaction is in an amount less than twenty-five thousand dollars (\$25,000), and the total amount of all such instruments or transactions is twenty-five thousand dollars (\$25,000) or more.

(2) Making, uttering, or delivering one (1) or more instruments or transactions drawn on insufficient funds or drawn on nonexistent accounts is a Class C felony if:

(A) The amount of any one (1) instrument or transaction is less than twenty-five thousand dollars (\$25,000) but more than five thousand dollars (\$5,000); or

(B) More than one (1) instrument or transaction has been drawn within a ninety-day period, each instrument or transaction is in an amount of five thousand dollars (\$5,000) or less, and the total amount of all such instruments or transactions is more than five thousand dollars (\$5,000).

(3) Making, uttering, or delivering one (1) or more instruments or transactions drawn on insufficient funds or drawn on nonexistent accounts is a Class D felony if:

(A) The amount of any one (1) instrument or transaction is five thousand dollars (\$5,000) or less but more than one thousand dollars (\$1,000); or

(B) More than one (1) instrument or transaction has been drawn within a ninety-day period, each instrument or transaction is in an amount of one thousand dollars (\$1,000) or less, and the total amount of all such instruments or transactions is more than one thousand dollars (\$1,000).

(4) Under subdivisions (b)(1)(B), (b)(2)(B), and (b)(3)(B) of this section, each instrument or transaction may be added together in a single prosecution.

(c)(1) Any court passing sentence upon a person convicted of any offense under §§ 5-37-301 — 5-37-306 may also order the person to make full restitution to the plaintiff or complaining party.

(2) All court costs may be taxed to the convicted defendant.

**History.** Acts 1959, No. 241, § 5; 1961, No. 500, § 1; 1977, No. 766, § 1; 1981, No. 899, § 5; 1983, No. 473, § 2; 1983, No. 719, § 4; 1985, No. 254, § 1; A.S.A. 1947, § 67-723; Acts 2001, No. 1466, § 3; 2007, No. 632, § 1; 2009, No. 748, § 22; 2011, No. 570, § 28; 2013, No. 425, § 1; 2013, No. 1125, § 11.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

**Amendments.** The 2009 amendment

substituted "five hundred dollars (\$500)" for "two hundred dollars (\$200)" in (b)(2)(B).

The 2011 amendment rewrote the section.

The 2013 amendment by No. 425, in (b)(2)(B), substituted "of" for "less than twenty-five thousand dollars (\$25,000) but more than," inserted "or less," and deleted "less than twenty-five thousand dollars (\$25,000) but" preceding "more than five"; in (b)(3)(B), deleted "five thousand dollars (\$5,000) or less but more than" preceding "one thousand," inserted "or less," and deleted "five thousand dol-



lars (\$5,000) or less but” preceding “more than one”; removed the (b)(4)(A) designation; and deleted (b)(4)(B).

The 2013 amendment by No. 1125 deleted former (b)(4) and redesignated for-

mer (b)(5) as present (b)(4); and inserted “and (b)(3)(B)” in (b)(4).

### **5-37-307. Knowingly issuing worthless check.**

(a) A person commits an offense if he or she issues or passes a check, order, draft, or any other form of presentment involving the transmission of account information for the payment of money knowing that the issuer does not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check, order, draft, or any other form of presentment involving the transmission of account information, as well as any other check, order, draft, or any other form of presentment involving the transmission of account information outstanding at the time of issuance.

(b)(1) This section and § 21-6-411 do not apply to a preexisting debt or a situation in which nothing of value was acquired.

(2) However, this section and § 21-6-411 do apply to a payment of rent, child support, consignment, tax, license, fee, fine, and court costs.

(c)(1) This section does not prevent the prosecuting attorney from establishing the required knowledge by direct evidence.

(2) However, for purposes of this section, the issuer’s knowledge of insufficient funds is presumed, except in the case of a postdated check, order, draft, or any other form of presentment involving the transmission of account information if:

(A) The issuer had no account with the bank or other drawee at the time he or she issued the check, order, draft, or any other form of presentment involving the transmission of account information; or

(B) Payment was refused by the bank or other drawee for lack of funds or insufficient funds on presentation within thirty (30) days after issue and the issuer failed to pay the holder in full, plus a service charge not to exceed thirty dollars (\$30.00), plus the amount of any fees charged to the holder of the check by a financial institution as a result of the check’s not being honored, within ten (10) days after receiving notice of that refusal.

(d) Notice for purposes of this section shall be by the procedure as set forth in §§ 5-37-303 and 5-37-304.

(e) If notice is given, it is presumed that the notice was received no later than five (5) days after it was sent.

(f) An offense under this section is a violation and is punishable as provided in § 5-4-104.

(g) This act is cumulative to all other acts and shall not repeal any other act.

**History.** Acts 1985 (1st Ex. Sess.), No. 678, § 2; 1991, No. 1051, § 2; 1995, No. 33, §§ 1, 4; A.S.A. 1947, §§ 67-726, 67-335, § 4; 2001, No. 996, § 4; 2001, No. 728n; Acts 1987, No. 69, § 2; 1987, No. 1466, § 4; 2011, No. 1012, § 5.

**Amendments.** The 2011 amendment substituted “thirty dollars (\$30.00)” for “twenty-five dollars (\$25.00)” in (c)(2)(B)

#### **SUBCHAPTER 4 — CABLE TELEVISION**

##### **SECTION.**

5-37-402. Theft of communication services — Unlawful communication and access devices.

##### **SECTION.**

5-37-407. Additional civil remedies.

#### **5-37-402. Theft of communication services — Unlawful communication and access devices.**

(a) A person commits theft of communication services if he or she knowingly and with the intent to defraud a communication service provider:

(1) Obtains or attempts to obtain or uses a communication service without the authorization of or proper compensation paid to the communication service provider, or assists or instructs any other person in doing so with the intent to defraud the communication service provider;

(2) Tampers with, modifies, or maintains a modification to a communication device installed or provided by the communication service provider with the intent to defraud that communication service provider;

(3) Possesses with the intent to distribute, manufactures, develops, assembles, distributes, transfers, imports into this state, licenses, leases, sells or offers, promotes or advertises for sale, use, or distribution any communication device:

(A) For the commission of a theft of a communication service or to receive, intercept, disrupt, transmit, retransmit, decrypt, or acquire or facilitate the receipt, interception, disruption, transmission, retransmission, decryption, or acquisition of any communication service without the express consent or express authorization of the communication service provider, as stated in a contract or otherwise; or

(B) With the intent to conceal or to assist another to conceal from any communication service provider or from any lawful authority the existence or place of origin or destination of any communication, provided that the concealment is for the purpose of committing a violation of subdivision (a)(3)(A) of this section;

(4) Tampers or otherwise interferes with or connects to by any means, whether mechanical, electrical, acoustical, or other means, any cable, wire, or other device used for the distribution of cable television without authority from the operator of the service, modifies, alters, programs, or reprograms a communication device for a purpose described in subdivision (a)(3) of this section;

(5) Possesses, uses, manufactures, develops, assembles, distributes, imports into this state, licenses, transfers, leases, sells, offers, pro-



notes, or advertises for sale, use, or distribution any unlawful access device; or

(6) Possesses, uses, prepares, distributes, sells, gives, transfers, offers, promotes, or advertises for sale, use, or distribution any:

(A) Plans or instructions for making, assembling, or developing any unlawful access device under circumstances evidencing an intent to use or employ the communication device or unlawful access device, or to allow the communication device or unlawful access device to be used or employed for a purpose prohibited by this subchapter, or knowing or having reason to believe that the communication device or unlawful access device is intended to be so used, or that the plans or instructions are intended to be used for manufacturing or assembling the communication device or unlawful access device for a purpose prohibited by this subchapter; or

(B) Material, including hardware, a cable, a tool, data, computer software, or other information or equipment, knowing that the purchaser or a third person intends to use the material in the manufacture, assembly, or development of a communication device for a purpose prohibited by this subchapter, or for use in the manufacture, assembly, or development of an unlawful access device.

(b)(1) However, nothing in this section shall be construed to prohibit the manufacture, importation, sale, lease, or possession of any television device possessing the internal hardware necessary to receive a cable television signal without the use of a converter, device, or box, or of any television advertised as "cable ready".

(2) A person that manufactures, produces, assembles, designs, sells, distributes, licenses, or develops a multipurpose device is not in violation of this section unless that person acts knowingly and with an intent to defraud a communication service provider and the multipurpose device:

(A) Is manufactured, developed, assembled, produced, designed, distributed, sold, or licensed for the primary purpose of committing a violation of this section;

(B) Has only a limited commercially significant purpose or use other than as an unlawful access device or for the commission of any other violation of this section; or

(C) Is marketed by that person or another person in concert with that person with that person's knowledge for use as an unlawful access device or for the purpose of committing any other violation of this section.

(3) Nothing in this section requires that the design of or design and selection of a part, software code, or component for a communication device provide for a response to any particular technology, device, or software, or any component or part thereof, used by the provider, owner, or licensee of any communication service or of any data, audio or video program, or transmission to protect any such communication, data, audio or video service, program, or transmission from unauthorized receipt, acquisition, interception, access, decryption, disclosure, communication, transmission, or retransmission.

(4) This section does not apply to the following entities or persons when lawfully acting in the capacity listed in this subdivision (b)(4) and as expressly authorized to do so by any other state or federal statute or regulation:

(A) State or local law enforcement agency;

(B) State or local government authority, municipality, or agency; and

(C) Communication service provider.

**History.** Acts 1985, No. 781, § 2; A.S.A. 1947, § 41-2211; Acts 1997, No. 348, § 1; 2003, No. 1806, § 2.

**Publisher's Notes.** This section is being set out to update references in (a)(3)(B) and (a)(4).

### 5-37-407. Additional civil remedies.

(a)(1) In addition to any other provision of this subchapter, any person aggrieved by a violation of this subchapter may bring a civil action in any court of competent jurisdiction.

(2) As used in this section, "any person aggrieved" includes any communication service provider.

(b) The court may:

(1) Award declaratory relief and any other equitable remedy, including a preliminary or final injunction to prevent or restrain a violation of this subchapter, without requiring proof that the plaintiff has suffered or will suffer actual damages or irreparable harm or lacks an adequate remedy at law;

(2) At any time while an action is pending, order the impounding, on such terms as it deems reasonable, of any communication device or unlawful access device that is in the custody or control of the violator and that the court has reasonable cause to believe was involved in the alleged violation of this subchapter;

(3) Award damages as described in subsection (c) of this section;

(4) In the court's discretion, award reasonable attorney fees, costs, and expenses to an aggrieved party who prevails; and

(5) As part of a final judgment or decree finding a violation of this subchapter, order the remedial modification or destruction of any communication device or unlawful access device or any other device or equipment involved in the violation that is in the custody or control of the violator or has been impounded under subdivision (b)(2) of this section.

(c) Damages awarded by a court under this subchapter shall be computed as either of the following:

(1)(A) Upon his or her election of damages at any time before final judgment is entered, the complaining party may recover the actual damages suffered by him or her as a result of the violation of this subchapter and any profits of the violator that are attributable to the violation.

(B) Actual damages include the retail value of any communication service illegally available to a person to whom the violator directly or



indirectly provided or distributed any communication device or unlawful access devices.

(C) In proving actual damages, the complaining party shall prove only that the violator manufactured, distributed, or sold any communication device or unlawful access devices.

(D) In determining the violator's profits, the complaining party shall prove only the violator's gross revenue and the violator shall prove his or her deductible expenses; or

(2) Upon election by the complaining party at any time before final judgment is entered, that party may recover in lieu of actual damages, an award of statutory damages of one thousand dollars (\$1,000) for each communication device or unlawful access device involved in the action, with the amount of statutory damages to be determined by the court, as the court considers just.

(d) In any case in which the court finds that any violation of this subchapter was committed willfully and for a purpose of commercial advantage or private financial gain, the court in its discretion may increase the total award of any damages under subsection (c) of this section by an amount of not more than fifty thousand dollars (\$50,000) for each communication device or unlawful access device involved in the action or for each day the defendant was in violation of this subchapter.

**History.** Acts 2003, No. 1806, § 6;  
2007, No. 827, § 41.

## SUBCHAPTER 5 — BUSINESS AND COMMERCIAL OFFENSES GENERALLY

### SECTION.

5-37-505. Insurance fraud by use of a  
procurer.

5-37-506. Prohibited action by a pro-  
curer.

### SECTION.

5-37-507. Software and other devices and  
mechanisms used to falsify  
electronic records.

### 5-37-505. Insurance fraud by use of a procurer.

(a) As used in this section and § 5-37-506:

(1)(A) "Procurer" means a person or entity that for pecuniary benefit procures or attempts to procure a client, patient, or customer by directly contacting the client, patient, or customer in person, by telephone, or by electronic means at the direction of, request of, employment of, or in cooperation with a provider.

(B) "Procurer" does not include a provider or a person that procures or attempts to procure a client, patient, or customer for a provider through public media or a person that refers a client, patient, or customer to a provider as otherwise authorized by law;

(2) "Provider" means:

(A) An attorney;

(B) A healthcare provider; or

(C) An employee of a provider; and

(3) "Public media" means telephone directories, professional directories, newspapers and other periodicals, radio and television, billboards, and mailed or electronically transmitted written or visual communications that do not involve in-person or direct contact with a specific prospective client, patient, or customer.

(b) A person commits the offense of insurance fraud by use of a procurer if:

(1) He or she is a procurer or provider; and

(2) For the purpose of defrauding an insured person or an insurance carrier, he or she knowingly:

(A) Falsely represents the services to be provided to an actual or prospective client, patient, or customer;

(B) Makes a misrepresentation, including without limitation affiliation with an insurance company, a law enforcement agency, or a governing board of a healthcare provider while procuring or attempting to procure a client, patient, or customer; or

(C) Uses, solicits, directs, hires, or employs another person to act as a procurer to falsely represent the services to be provided to an actual or prospective client, patient, or customer.

(c) Insurance fraud by use of a procurer or provider is a Class D felony.

**History.** Acts 2013, No. 513, § 1.

### **5-37-506. Prohibited activity by a procurer.**

(a) A person commits the offense of prohibited activity by a procurer if:

(1) The person is a procurer and he or she knowingly:

(A) Offers or gives anything of value to a person in order to cause the person to seek medical care from a specific healthcare provider; or

(B) Solicits a person currently under the care of a chiropractic physician to seek care from another chiropractic physician; or

(2) The person is a provider and he or she knowingly permits a procurer that he or she uses, directs, or employs to engage in conduct prohibited by subdivision (a)(1) of this section.

(b) Prohibited activity by a procurer or provider is a Class D felony.

**History.** Acts 2013, No. 513, § 1.

### **5-37-507. Software and other devices and mechanisms used to falsify electronic records.**

(a) It is unlawful for a person to knowingly manufacture, sell, rent, lease, make available, purchase, install, transfer, possess, or use software or any other device or mechanism designed to falsify the electronic records of an electronic cash register or other point-of-sale system for the purpose of evading a tax due under Arkansas law.

(b) A person that violates this section upon conviction is:

(1) Guilty of a Class C felony; and



(2) Liable for all taxes assessed by the Department of Finance and Administration under the Arkansas Tax Procedure Act, § 26-18-101 et seq., as the result of the violation of this section.

**History.** Acts 2013, No. 1076, § 2.

## CHAPTER 38

### DAMAGE OR DESTRUCTION OF PROPERTY

#### SUBCHAPTER.

2. OFFENSES GENERALLY.

3. ARSON AND OTHER BURNING.

#### SUBCHAPTER 2 — OFFENSES GENERALLY

##### SECTION.

5-38-203. Criminal mischief in the first degree.

5-38-204. Criminal mischief in the second degree.

5-38-205. Impairing the operation of a vital public facility.

##### SECTION.

5-38-206. Damaging wires and other fixtures of telephone, cable, and electric power companies.

5-38-210 — 5-38-212. [Repealed.]

#### **5-38-203. Criminal mischief in the first degree.**

(a) A person commits the offense of criminal mischief in the first degree if he or she purposely and without legal justification destroys or causes damage to any:

(1) Property of another; or

(2) Property, whether his or her own or property of another, for the purpose of collecting any insurance for the property.

(b) Criminal mischief in the first degree is a:

(1) Class A misdemeanor if the amount of actual damage is one thousand dollars (\$1,000) or less;

(2) Class D felony if the amount of actual damage is more than one thousand dollars (\$1,000) but five thousand dollars (\$5,000) or less;

(3) Class C felony if the amount of actual damage is more than five thousand dollars (\$5,000) but less than twenty-five thousand dollars (\$25,000); or

(4) Class B felony if the amount of actual damage is twenty-five thousand dollars (\$25,000) or more.

(c) In an action under this section involving cutting and removing timber from the property of another person:

(1) The following create a presumption of a purpose to commit the offense of criminal mischief in the first degree:

(A) The failure to obtain the survey as required by § 15-32-101; or

(B) The purposeful misrepresentation of the ownership or origin of the timber; and

(2)(A) There is imposed in addition to a penalty in subsection (b) of this section a fine of not more than two (2) times the value of the timber destroyed or damaged.

(B) However, in addition to subdivision (c)(2)(A) of this section, the court may require the defendant to make restitution to the owner of the timber.

(d) A person convicted of a felony offense under this section is subject to an enhanced sentence of an additional term of imprisonment of five (5) years at the discretion of the court if the finder of fact finds that the damage to property involved the removal of nonferrous metal, as it is defined in § 17-44-101.

**History.** Acts 1975, No. 280, § 1906; 1977, No. 360, § 7; 1981, No. 544, § 2; 1981, No. 671, § 1; A.S.A. 1947, § 41-1906; Acts 1988 (3rd Ex. Sess.), No. 13, § 1; 1995, No. 1296, § 5; 1997, No. 448, § 1; 2005, No. 1994, § 443; 2011, No. 570, § 29; 2013, No. 1354, § 5.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "Legislative intent. The in-

tent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

**Amendments.** The 2011 amendment rewrote (b)(1) and (b)(2); and added (b)(3) and (b)(4).

The 2013 amendment added (d).

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Annual Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

## CASE NOTES

### ANALYSIS

Evidence.

Timber.

Willful Causation.

### Evidence.

Substantial evidence supported defendant's convictions for commercial burglary, criminal mischief, and breaking and entering because the testimony of defendant's accomplice, who was defendant's son, was sufficiently corroborated, as required by § 16-89-111(e)(1), by an officer's testimony as to the items he found in defendant's truck, matching the description of items stolen from a convenience store. The accomplice admitted that he and defendant entered the store by using a cable to pull open the front doors and that he and defendant used bolt cutters and a pry bar to break into gaming machines, and these items, along with packages of cigarettes stolen from the store, were found by police officers in defen-

dant's truck. *Dunlap v. State*, 2010 Ark. App. 582, — S.W.3d — (2010).

Defendant's conviction for first-degree criminal mischief under subdivision (a)(1) of this section was supported by substantial evidence as: (1) it was fair to presume that defendant purposely for § 5-2-202(1) purposes broke a former supervisor's car windows when defendant repeatedly swung a long, heavy metal object at them; (2) defendant's statement to the supervisor immediately prior to smashing the supervisor's windows that defendant should "kick (the supervisor's) ass" demonstrated defendant's anger and indicated a desire to express that anger with violence; and (3) defendant failed to support a claim that defendant's actions were justified. *Warren v. State*, 2011 Ark. App. 102, — S.W.3d — (2011).

### Timber.

Evidence was sufficient to sustain a first-degree criminal mischief conviction where defendant used a bulldozer to make



roads throughout the owner's property, logged the entire 300 acres of its timber, and the jury was not obligated to believe that defendant was acting under what he believed was the owner's consent. *Jester v. State*, 367 Ark. 249, 239 S.W.3d 484 (2006).

In a criminal mischief case, the court properly ordered defendant to pay \$180,000 in restitution as the land owner estimated his timber loss to be about \$180,000 in his complaint that he filed with the Arkansas Forestry Commission, which was introduced into evidence at trial; further, his expert estimated that the remaining property value was worth \$150,000, and defendant himself offered the owner \$180,000 for the property in hopes to settle the dispute. *Jester v. State*, 367 Ark. 249, 239 S.W.3d 484 (2006).

Trial court did not err in denying appellants a new trial or remittitur regarding a punitive damage award in favor of appellees, as the award was not in excess of federal due process standards, given that (1) appellees suffered economic harm, but the harm was much more than purely economic injury, as appellants cut down approximately 40 percent of appellees' future retirement homesite and the privacy afforded by the trees was very important to appellees, (2) appellants' action forced appellees to give up their plans to retire to the property and ultimately sell it, (3) the tree cutting was intentional and not an isolated incident, (4) the profit appellants

received from the sale of their property was a direct result of the tree clearing on appellees' property, (5) the award was not so grossly excessive as to have violated federal due process, (6) each of appellants were on notice of and could have been charged with a Class C felony of criminal mischief under subdivision (b)(1) of this section with, under § 5-4-201(a)(2), a potential fine of \$10,000, plus a violation of § 15-32-101(a)(1), (7) was a misdemeanor, with a potential fine and jail time, and (8) under § 18-60-102(a)(1), appellants had ample notice that their actions could result in a penalty of \$25,000 punitive damages. *Bronakowski v. Lindhurst*, 2009 Ark. App. 513, 324 S.W.3d 719 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 669 (July 29, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 804 (Dec. 3, 2009).

#### **Willful Causation.**

Defendant's conviction for first-degree criminal mischief under subdivision (a)(1) of this section was not supported by substantial evidence where the charge was premised on the theory that he purposely caused damage to another driver's jeep, because although there was abundant evidence to show that defendant was acting recklessly, there was nothing to show that he acted with the purpose of damaging the jeep. *Ross v. State*, 2012 Ark. App. 243, — S.W.3d — (2012).

### **5-38-204. Criminal mischief in the second degree.**

(a) A person commits criminal mischief in the second degree if the person:

(1) Recklessly destroys or damages any property of another person; or

(2) Purposely tampers with any property of another person and by the tampering causes substantial inconvenience to the owner or another person.

(b) Criminal mischief in the second degree is a:

(1) Class A misdemeanor if the amount of actual damage is one thousand dollars (\$1,000) or more but less than five thousand dollars (\$5,000);

(2) Class D felony if the amount of actual damage is five thousand dollars (\$5,000) or more; or

(3) Class B misdemeanor if otherwise committed.

(c) A person convicted of a felony offense under this section is subject to an enhanced sentence of an additional term of imprisonment of five

(5) years at the discretion of the court if the finder of fact finds that the damage to property involved the removal of nonferrous metal, as it is defined in § 17-44-101.

**History.** Acts 1975, No. 280, § 1907; A.S.A. 1947, § 41-1907; Acts 1989, No. 735, § 1; 2011, No. 570, § 30; 2013, No. 1354, § 6.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "Legislative intent. The intent of this act is to implement compre-

hensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

**Amendments.** The 2011 amendment rewrote (b)(1) and (b)(2).

The 2013 amendment added (c).

## CASE NOTES

### Evidence.

Judgment notwithstanding the verdict was properly granted in a malicious prosecution case where the passenger of a truck was arrested when the vehicle bumped a key-card entry gate; even if there was no damage to the gate or a mistake about such, there was still probable cause for an arrest for criminal mischief or attempt under Ark. R. Crim. P. 4.1(c). *Coombs v. Hot Springs Village Prop. Owners Ass'n*, 98 Ark. App. 226, 254 S.W.3d 5 (2007), rehearing denied, *Coombs v. Hot Springs Vill. Prop. Owners Ass'n*, — Ark. App. —, — S.W.3d —, 2007 Ark. App. LEXIS 543 (May 2, 2007).

As the victim exited her truck, a man grabbed her by her neck, put a gun to her

head, and asked for her keys; she was forced into her residence and heard a shotgun fire as the man drove away. The police spotted the truck traveling at a high rate of speed apparently in flight from the scene of the crime and defendant's fingerprint was recovered from the doors; the evidence was not sufficient to sustain defendant's conviction for aggravated robbery, theft of property, and criminal mischief because there was no way to determine when defendant touched the truck. *Turner v. State*, 103 Ark. App. 248, 288 S.W.3d 669 (2008), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 514 (Jan. 22, 2009).

**Cited:** *Misenheimer v. State*, 100 Ark. App. 189, 265 S.W.3d 764 (2007).

## 5-38-205. Impairing the operation of a vital public facility.

(a) A person commits the offense of impairing the operation of a vital public facility if, having no reasonable ground to believe he or she has a right to do so, the person knowingly causes a substantial interruption or impairment of an operation of a vital public facility by:

- (1) Damaging the property of another person;
- (2) Incapacitating an operator of a vital public facility; or
- (3) Engaging in:

(A) A fight or violent and tumultuous behavior; or

(B) Any other conduct that causes a substantial disruption, obstruction, or impediment to the operation of a vital public facility.

(b)(1) Except as provided in subdivision (b)(2) of this section, impairing the operation of a vital public facility is a Class C felony.

(2) Impairing the operation of a vital public facility under subdivision (a)(3) of this section is a Class A misdemeanor.

(c) As used in this section, "vital public facility" includes a county jail, city jail, public detention facility, or temporary holding facility for detained persons.



**History.** Acts 1975, No. 280, § 1908; A.S.A. 1947, § 41-1908; Acts 2009, No. 1210, § 1; 2011, No. 1120, § 9.

**Amendments.** The 2009 amendment inserted (a)(3); inserted "Except as provided in subdivision (b)(2) of this section"

in (b)(1); added (b)(2) and redesignated the existing text of (b) accordingly; added (c); and made related changes.

The 2011 amendment substituted "vital public facility" for "vital facility" in (a)(3)(B).

### **5-38-206. Damaging wires and other fixtures of telephone, cable, and electric power companies.**

(a) It is unlawful for a person to knowingly damage, destroy, or pull down:

(1) A telephone, cable communications, or electric power transmission pedestal or pole owned or operated by a telephone, cable, or electric power company;

(2) A telephone, cable communications, or electric power line, wire, fiber insulator, power supply transformer, transmission, or other apparatus, equipment, or fixture used in the transmission of telephone, cable communications, or electric power owned or operated by a telephone, cable, or electric power company; or

(3) Equipment related to wireless communications that are regulated by the Federal Communications Commission.

(b) It is unlawful for a person to knowingly damage, destroy, remove, or alter in a way that could result in physical injury any electric power line, gas line, water line, wire or fiber insulator, electric motor, or other similar apparatus connected to a farm shop, an on-farm grain drying and storage complex, a heating and cooling system, an environmental control system, an animal production facility, an irrigation system, or a dwelling.

(c) A violation of this section is a Class D felony.

**History.** Acts 2009, No. 390, § 1; 2011, No. 1120, § 10.

**Amendments.** The 2011 amendment rewrote (b).

### **5-38-210 — 5-38-212. [Repealed.]**

**Publisher's Notes.** These sections, concerning allowing animals into enclosures and division fences, seed horses, unaltered mules, or jacks running at large, and destruction of native growth were repealed by Acts 2013, No. 1348, §§ 1-3. The sections were derived from the following sources: 5-38-210. Acts 1883, No. 28, §§ 1-5, p. 50; C. & M. Dig.,

§§ 2533-2537; Pope's Dig., §§ 3182-3186; A.S.A. 1947, §§ 41-1966 — 41-1970; Acts 2005, No. 1994, § 46. 5-38-211. Rev. Stat., ch. 74, § 1; C. & M. Dig., § 344; A.S.A. 1947, § 78-1136. 5-38-212. Acts 1935, No. 159, §§ 1-4; Pope's Dig., §§ 3199-3201; A.S.A. 1947, §§ 41-1971 — 41-1974; Acts 2005, No. 1994, § 47.

## **SUBCHAPTER 3 — ARSON AND OTHER BURNING**

### **SECTION.**

5-38-301. Arson.

5-38-310. Unlawful burning.

### **SECTION.**

5-38-312. No presumption on cause of fire.

**5-38-301. Arson.**

(a) A person commits arson if he or she:

(1) Starts a fire or causes an explosion with the purpose of destroying or otherwise damaging:

(A) An occupiable structure or motor vehicle that is the property of another person;

(B) Any property, whether his or her own or property of another person, for the purpose of collecting any insurance for the property;

(C) Any property, whether his or her own or property of another person, if the act thereby negligently creates a risk of death or serious physical injury to any person;

(D) A vital public facility;

(E) Any dedicated church property used as a place of worship exempt from taxes pursuant to § 26-3-301; or

(F) Any public building or occupiable structure that is either owned or leased by the state or any political subdivision of the state; or

(2) Recklessly causes a fire or an explosion in the course of and in furtherance of a felony or in immediate flight after committing a felony that results in destroying or otherwise damaging:

(A) Any occupiable structure or motor vehicle;

(B) Any property, if the fire or explosion creates a risk of death or serious physical injury to any person;

(C) A vital public facility;

(D) Any dedicated church property used as a place of worship exempt from taxes pursuant to § 26-3-301; or

(E) Any public building or occupiable structure that is either owned or leased by the state or any political subdivision of the state.

(b) Arson is a:

(1) Class A misdemeanor if the property sustains less than five hundred dollars (\$500) worth of damage;

(2) Class D felony if the property sustains at least five hundred dollars (\$500) but less than two thousand five hundred dollars (\$2,500) worth of damage;

(3) Class C felony if the property sustains at least two thousand five hundred dollars (\$2,500) but less than five thousand dollars (\$5,000) worth of damage;

(4) Class B felony if the property sustains at least five thousand dollars (\$5,000) but less than fifteen thousand dollars (\$15,000) worth of damage;

(5) Class A felony if the property sustains at least fifteen thousand dollars (\$15,000) but less than one hundred thousand dollars (\$100,000) worth of damage; or

(6) Class Y felony if the property sustains damage in an amount of at least one hundred thousand dollars (\$100,000).

(c) As used in this section, "motor vehicle" means every self-propelled device in, upon, or by which any person or property is, or may be, transported or drawn upon a street or highway.



(d)(1)(A) If the Governor deems it necessary, he or she may offer a reward not to exceed fifty thousand dollars (\$50,000) for information leading to the apprehension, arrest, and conviction of a person who has committed, attempted to commit, or conspired to commit a criminal offense under this section.

(B) The fifty-thousand-dollar reward maximum imposed by this section only applies to state-appropriated funds.

(C) The Governor may increase the amount of any reward offered by use of funds from the Reward Pool Fund created in this section.

(2) When the Governor offers a reward pursuant to this section, he or she may place any reasonable condition upon collection of the reward as he or she deems necessary.

(3)(A) The Governor may establish and administer a fund to be known as the "Reward Pool Fund".

(B) Any monetary donation or gift made by a private citizen or corporation for the purpose of offering a reward or enhancing a state-funded reward offered for information leading to the apprehension, arrest, and conviction of a person who has committed, attempted to commit, or conspired to commit a criminal offense under this section shall be deposited in the fund.

(C)(i) The Governor shall have the sole discretion to determine if and how much of the fund is offered in a particular criminal case.

(ii) However, if the donor places any lawful restriction or instruction on use of the donation at the time it is given, the restriction or instruction shall be honored.

(4) Any person completing the requirements to be eligible for the reward is entitled to the reward offered by the Governor, and the Governor shall certify the amount of the reward to the Auditor of State, who shall issue his or her warrant on the State Treasury for the reward, to be paid out of any money appropriated or deposited into the fund.

**History.** Acts 1975, No. 280, § 1902; 299, § 1; 1997, No. 921, § 1; 2005, No. 1981, No. 544, § 1; A.S.A. 1947, § 41-1529, § 1; 2007, No. 827, § 42.  
1902; Acts 1987, No. 242, § 1; 1991, No.

## CASE NOTES

### ANALYSIS

Evidence.  
Sentence.

### Evidence.

There was substantial evidence to convict defendant of arson because (1) a firefighter stated that, while responding to the fire, he saw defendant walking away from the crime scene; (2) the daughter-in-law of the victim's next door neighbor saw a pedestrian trying to hide his face from her as she drove past him, and she testified that defendant would have known her

truck because she was at her mother-in-law's home about three days a week; (3) a reserve deputy who handled bloodhounds testified that his select-scent dog tracked defendant's scent 1.8 miles from a county road to the back door of the victim's mobile home; (4) there were spermatozoa cells present in the victim's rectum, which could generally live only 24 hours there, which gave rise to an inference that defendant had sexual relations with the victim close to the time she died; (5) defendant's DNA was present on the rectal swab and the probability of selecting an individual

at random from the general population having the same genetic markers as those from defendant would be one in one trillion; (6) medical evidence showed that the victim was dead before the fire began, implying that she did not start it; and (7) the lead investigator on the fire ruled out any electrical malfunction as the cause of the fire. *Wright v. State*, 368 Ark. 629, 249 S.W.3d 133 (2007).

#### **Sentence.**

Because the sentence of 20 years' imprisonment with a 10-year suspended im-

position of sentence, while falling within the statutory-sentencing range for Class A arson under subdivision (b)(5) of this section and § 5-4-401(a)(2), exceeded the range for Class B residential burglary and Class C theft of property, under §§ 5-39-201(a)(2), 5-36-103(b)(2), 5-4-401(a)(3), (4), the residential-burglary and theft-of-property sentences were illegal, and the case was remanded for resentencing. *Wakeley v. State*, 2013 Ark. App. 231, — S.W.3d — (2013).

### **5-38-302. Reckless burning.**

#### **CASE NOTES**

#### **Collateral Estoppel in Civil Case.**

For purposes of collateral estoppel, a guilty plea in a criminal case is not equivalent to a criminal conviction that has been "actually litigated." Therefore, in a defense obligation dispute, summary judgment was improperly granted to a homeowners' insurer because collateral

estoppel could not have been used to show that an illegal purpose exclusion applied based on a guilty plea to reckless burning under subsection (a) of this section since the issues of intent and purpose were never actually litigated. *Bradley Ventures, Inc. v. Farm Bureau Mut. Ins. Co.*, 371 Ark. 229, 264 S.W.3d 485 (2007).

### **5-38-310. Unlawful burning.**

- (a) A person commits the offense of unlawful burning if the person:
  - (1) Sets on fire or causes or procures to be set on fire any forest, brush, or other inflammable vegetation on another person's land;
  - (2) Allows a fire that he or she built or has charge of to escape from his or her control or to spread to a person's land other than that of the builder of the fire;
  - (3)(A) Burns any brush, stumps, logs, rubbish, fallen timber, grass, stubble, or debris of any sort, whether on the person's own land or another person's land, without taking necessary precaution both before lighting the fire and at any time after lighting the fire to prevent the escape of the fire.
  - (B) The escape of fire to adjoining timber, brush, or grassland is prima facie evidence that a necessary precaution was not taken;
  - (4) Builds a camp fire on another person's land without clearing the ground immediately around it of material that will carry fire;
  - (5) Leaves on another person's land a camp fire to spread on that person's land;
  - (6) Starts a fire in forest material not the person's own by throwing away a lighted cigar, match, or cigarette or by the use of a firearm or in any other manner and leaves the fire unextinguished;
  - (7) Defaces or destroys a fire warning notice;
  - (8) Is an employee of the Arkansas Forestry Commission or an officer charged with a duty of enforcing a criminal law and fails to attempt to



secure the arrest and conviction of a person against whom he or she has evidence or can secure evidence of violating a fire law; or

(9) Sets on fire or causes or procures to be set on fire any forest, brush, or other flammable material in violation of a burn ban on outdoor burning declared under § 12-75-108.

(b) Unlawful burning is a Class A misdemeanor.

(c) A bond for costs shall not be required in a court of this state for prosecution for violation of this section.

(d) It is not a violation of:

(1) Subdivision (a)(8) of this section for an employee of the commission to fail to enforce subdivision (a)(9) of this section; or

(2) Subdivision (a)(9) of this section if the person was:

(A) Acting under a permit issued by the chief executive of the political subdivision issuing the burn ban; or

(B)(i) Setting on fire or causing or procuring to be set on fire any crop remainder or remaining vegetation after harvest of the crop on the person's land.

(ii)(a) In order to provide a safety barrier between the crop remainder or remaining vegetation and adjacent land, the person shall perform adequate disking of field perimeters or perform other safety measures as required by the county burn ban officer.

(b) If the person does not comply with subdivision (d)(2)(B)(ii)(a) of this section, the defense under subdivision (d)(2)(B)(i) is not available, and the person is liable for actual damages to adjacent land caused by the fire.

**History.** Acts 1935, No. 85, §§ 1, 8; Pope's Dig., §§ 3049, 3056; Acts 1981, No. 845, §§ 1, 2; A.S.A. 1947, §§ 41-1951, 41-1958; Acts 1993, No. 521, § 4; 2005, No. 1994, § 349; 2007, No. 465, § 1; 2009, No. 748, § 23; 2011, No. 1038, § 1.

**Amendments.** The 2009 amendment deleted "Miscellaneous misdemeanors" from the catchline, in (a), rewrote the introductory language, redesignated (a)(4) through (a)(7) as (a)(4) through (a)(9), deleted "Except as provided in subsection

(c) of this section" in (a)(8), and deleted "unless the defendant was acting pursuant to a permit issued by the chief executive of the political subdivision issuing the burn ban" at the end of (a)(9); inserted (b) and redesignated the subsequent subsection accordingly; deleted former (c); added (d); and made related and minor stylistic changes.

The 2011 amendment added the (d)(2)(A) designation and (d)(2)(B).

## 5-38-312. No presumption on cause of fire.

(a) The purpose of this section is to:

(1) Clarify that there is not a presumption as to the cause of fire related to a violation of this subchapter;

(2) Abolish any common law contrary to this section, including without limitation *Johnson v. State*, 198 Ark. 871, 131 S.W.2d 934 (1939) and *Thomas v. State*, 295 Ark. 29, 746 S.W.2d 49 (1988); and

(3) Clarify that there is no change under this section to the public policy as it relates to civil actions involving the cause of a fire.

(b) There is not a presumption in a prosecution brought under this subchapter that:

- (1) A fire was caused by:  
 (A) Accident; or  
 (B) Natural causes; or  
 (2) A fire was set on purpose or of incendiary origin.  
 (c) The burden of proof for the cause of a fire in a prosecution brought under this subchapter is beyond a reasonable doubt as provided under § 5-1-111.  
 (d) This section does not affect a civil action involving the cause of a fire.

**History.** Acts 2013, No. 982, § 1.

## CHAPTER 39

### BURGLARY, TRESPASS, AND OTHER INTRUSIONS

#### SUBCHAPTER.

2. OFFENSES GENERALLY.
3. OFFENSES INVOLVING POSTED AND ENCLOSED LAND.
4. OFFENSES INVOLVING CEMETERY OR GRAVE MARKERS.

#### SUBCHAPTER 1 — GENERAL PROVISIONS

#### 5-39-101. Definitions.

#### CASE NOTES

##### **Enter and Remain Unlawfully.**

Defendant's conviction for residential burglary was proper pursuant to subdivision (2)(A) of this section because, although defendant might have been licensed or privileged to enter the victim's

trailer, he was certainly not licensed or privileged to remain there after he began stabbing the victim and removing his property. *Young v. State*, 371 Ark. 393, 266 S.W.3d 744 (2007).

#### SUBCHAPTER 2 — OFFENSES GENERALLY

#### SECTION.

- 5-39-202. Breaking or entering.  
 5-39-203. Criminal trespass.

#### SECTION.

- 5-39-204. Aggravated residential burglary.

#### 5-39-201. Residential burglary — Commercial burglary.

#### CASE NOTES

#### ANALYSIS

Elements of Offense.  
 Evidence.  
 Sentence.

##### **Elements of Offense.**

Where defendant admitted that he committed third-degree assault against victim

by kicking and banging at the victim's door in an attempt to gain entry, the circuit court did not err in denying defendant's motion for directed verdict on the attempted burglary charge as defendant completed a substantial step towards entry by severely damaging victim's door and left only when the police were in the



area. *Davis v. State*, 368 Ark. 380, 368 Ark. 351, 246 S.W.3d 433 (2007).

### Evidence.

Defendant's motion for directed verdict was properly denied where there was sufficient evidence to convict defendant of residential burglary and third degree assault, § 5-13-207(a); defendant took steps to hinder the victim's ability to summon help by turning off the power and pulling out the phone lines, and the fact that defendant had a potentially deadly weapon on his person could at least raise an inference that he intended to, at the very least, place victim in fear for her physical well-being. *Diggs v. State*, 93 Ark. App. 332, 219 S.W.3d 654 (2005).

Evidence was sufficient to sustain defendant's convictions for aggravated robbery, residential burglary, and felony theft of property because an accomplice testified that he and defendant had a purpose of committing theft when they went to the victim's apartment, defendant used physical force upon the victim, defendant was armed with a deadly weapon, and a witness testified that she observed defendant carry out a television and load it into the car. *Navarro v. State*, 371 Ark. 179, 264 S.W.3d 530 (2007).

Defendant's conviction for residential burglary was proper pursuant to subdivision (a)(1) of this section because he carried a knife made from a railroad spike with him on the night of the homicide. The jury could have inferred from that evidence defendant's intent to commit a felony at the time of entrance in to the victim's trailer. *Young v. State*, 371 Ark. 393, 266 S.W.3d 744 (2007).

Because there was sufficient evidence to support defendant's rape conviction, there was no merit to defendant's argument regarding the sufficiency of the evidence for defendant's residential burglary conviction, in violation of subsection (a) of this section. *Young v. State*, 374 Ark. 350, 288 S.W.3d 221 (2008).

Where the victim testified that he discovered that two jars of coins were missing from his house after a visit from defendant and his cohort, an employee of a grocery store saw defendant's cohort cash in the coins and then throw away a jar; the theft victim identified the jar as his. In the second case, the victim testified that someone kicked in the door to his home

and a five-gallon water jug filled with coins was stolen shortly after he had spoken with defendant and his cohort at a club; based on the circumstantial evidence, defendant's possession of the coins, and his admission that he had stolen coins from the second victim before, the evidence was sufficient to support defendant's conviction for two counts of burglary in violation of subdivision (a)(1) of this section. *Mathis v. State*, 2009 Ark. App. 181, 314 S.W.3d 280 (2009).

Evidence was more than sufficient to prove that defendant did not have permission to be in the residence, because the victim ran from his residence yelling that he needed help and asking someone to call the police. *Lewis v. State*, 2009 Ark. App. 504, 323 S.W.3d 640 (2009).

Evidence was sufficient to support defendant's convictions for residential burglary and theft of property where defendant pawned a gun and a pendant that were stolen from the victims' home and, according to a witness, defendant admitted that he participated in the burglary and theft. *Stigger v. State*, 2009 Ark. App. 596, — S.W.3d — (2009).

Defendant's convictions for two counts of aggravated burglary were proper under subsection (a) of this section and § 5-39-204(a) because defendant's argument that there was no direct proof on the record of defendant holding a gun was without merit since substantial circumstantial evidence supported a finding of guilt, either as a principal or an accomplice. A neighbor verified that one of the intruders had a gun, the victim told the officers that the intruders hid their guns in the closet, where two guns were found, and both intruders were charged in the same instrument, implicating accomplice liability; that provided substantial evidence supporting the finding that the intruders at minimum represented by word or conduct that they were armed as a threat. *Hinton v. State*, 2010 Ark. App. 341, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 516 (June 2, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 399 (Aug. 6, 2010).

Appellant's conviction for residential burglary was affirmed where (1) the evidence showed that an angry appellant attempted to "bust in" the victim's front door to "put it in the couple's face," push-

ing his arm and body partially through the door and shooting his handgun into the residence; and (2) the evidence was consistent with appellant's guilt and inconsistent with any other reasonable conclusion. *Stephens v. State*, 2010 Ark. App. 363, — S.W.3d — (Apr. 28, 2010).

Substantial evidence supported defendant's convictions for commercial burglary, criminal mischief, and breaking and entering because the testimony of defendant's accomplice, who was defendant's son, was sufficiently corroborated, as required by § 16-89-111(e)(1), by an officer's testimony as to the items he found in defendant's truck, matching the description of items stolen from a convenience store. The accomplice admitted that he and defendant entered the store by using a cable to pull open the front doors and that he and defendant used bolt cutters and a pry bar to break into gaming machines, and these items, along with packages of cigarettes stolen from the store, were found by police officers in defendant's truck. *Dunlap v. State*, 2010 Ark. App. 582, — S.W.3d — (2010).

Defendant's convictions for residential burglary and terroristic threatening, in violation of subsection (a) of this section and § 5-13-301(b)(1) were supported by sufficient evidence, as he entered his ex-wife residence with the intent or purpose of assaulting her or of threatening either her or her boyfriend. *Cash v. State*, 2011 Ark. App. 493, — S.W.3d — (2011).

Appellant's convictions for aggravated robbery, aggravated residential burglary, and misdemeanor fleeing were affirmed where a witness testified that appellant pointed a sawed-off shotgun at his head, which would necessarily constitute proof that appellant was "armed with a deadly weapon"; the testimony of one eyewitness was sufficient to sustain a conviction. *Riley v. State*, 2011 Ark. App. 511, 385 S.W.3d 355 (2011).

Where defendant was convicted for residential burglary and theft under subdivision (a)(1) of this section and § 5-36-

103(a)(1), the trial court did not err by denying his motion for a directed verdict because the record showed that the victims returned from work to discover that their home had been burglarized; the back door of the residence had been kicked in and \$3,000 worth of property was missing. As defendant's palm print was found on the entertainment table, the jury was not required to resort to speculation or conjecture in reaching its verdicts. *Hicks v. State*, 2012 Ark. App. 667, — S.W.3d —, 2012 Ark. App. LEXIS 791 (Nov. 28, 2012).

Evidence was sufficient to sustain the revocation of defendant's suspended sentence because the victim saw where defendant had broken into his shop, noticed that tools and equipment had been gathered, discovered defendant hiding inside the shop, and the victim identified defendant in a photographic lineup. *Upshaw v. State*, 2013 Ark. App. 41, — S.W.3d — (2013).

Evidence was sufficient to sustain the revocation of defendant's suspended sentence because the victim saw where defendant had broken into his shop, noticed that tools and equipment had been gathered, discovered defendant hiding inside the shop, and the victim identified defendant in a photographic lineup. *Upshaw v. State*, 2013 Ark. App. 41, — S.W.3d — (2013).

### **Sentence.**

Because the sentence of 20 years' imprisonment with a 10-year suspended imposition of sentence, while falling within the statutory-sentencing range for Class A arson under §§ 5-38-301(b)(5), 5-4-401(a)(2), exceeded the range for Class B residential burglary and Class C theft of property, under subdivision (a)(2) of this section, and §§ 5-36-103(b)(2), 5-4-401(a)(3), (4), the residential-burglary and theft-of-property sentences were illegal, and the case was remanded for resentencing. *Wakeley v. State*, 2013 Ark. App. 231, — S.W.3d — (2013).

**Cited:** *Walker v. State*, 2010 Ark. App. 63, — S.W.3d — (2010).

## **5-39-202. Breaking or entering.**

(a) A person commits the offense of breaking or entering if for the purpose of committing a theft or felony he or she breaks or enters into any:

(1) Building, structure, or vehicle;



- (2) Vault, safe, cash register, safety deposit box, or money depository;
- (3) Money vending machine, coin-operated amusement machine, vending machine, or product dispenser;
- (4) Coin telephone or coin box;
- (5) Fare box on a bus; or
- (6) Other similar container, apparatus, or equipment.
- (b) It constitutes a separate offense under this section for the breaking or entering into of each separate:
  - (1) Building, structure, or vehicle;
  - (2) Vault, safe, cash register, safety deposit box, or money depository;
  - (3) Money vending machine, coin-operated amusement machine, vending machine, or product dispenser;
  - (4) Coin telephone or coin box;
  - (5) Fare box on a bus; or
  - (6) Other similar container, apparatus, or equipment.
- (c) Breaking or entering is a Class D felony.

**History.** Acts 1975, No. 280, § 2003; A.S.A. 1947, § 41-2003; Acts 1993, No. 296, § 1.

**Publisher's Notes.** This section is being set out to correct a subdivision designation.

## CASE NOTES

### ANALYSIS

Evidence.  
Proof.  
Vehicle.

#### Evidence.

Defendant's convictions for breaking or entering and theft of property were affirmed where defendant's fingerprints were found inside the passenger door along the top edge of the window of the car that was broken into. *Phillips v. State*, 88 Ark. App. 17, 194 S.W.3d 222 (2004), *aff'd*, 361 Ark. 1, 203 S.W.3d 630 (2005).

When the victim hired defendant to do yard work, he gave him permission to enter the garage where he stored his yard tools; defendant's admission that he stole some equipment from the garage was not sufficient to support his conviction for breaking or entering under this section. The Court of Appeals of Arkansas found that there was not substantial evidence to prove that defendant entered the victim's garage and the adjoining storage room for the purpose of stealing fishing reels and an air compressor/battery charger. *White v. State*, 2009 Ark. App. 782, — S.W.3d — (2009).

Defendant's conviction for breaking or entering in violation of subdivisions (a)(4)

and (a)(6) of this section, was appropriate because the store's general manager viewed a live feed of her store upon receiving an alert on the sound alarm, and she saw defendant on the feed. A reasonable trier of fact could have concluded that the noise was the result of someone breaking into the coin box; the manager testified that she secured the store upon seeing defendant and that no one entered the store between the time she saw defendant and the time she went to the store the next morning; and a photograph showed defendant to have been the only one in the store at the time the alarm sounded. *Haire v. State*, 2010 Ark. App. 89, — S.W.3d — (2010).

Defendant's convictions for breaking or entering in violation of subdivision (a)(1) of this section and theft of property were proper because there was substantial evidence showing that defendant, for the purpose of committing a theft or felony, broke into the victim's vehicle. Substantial evidence also existed to support the finding that defendant knowingly took and exercised unauthorized control over the victim's tow-truck keys with the purpose of depriving the victim of them. *Washington v. State*, 2010 Ark. App. 339, 374 S.W.3d 822 (2010), review denied, —

Ark. —, — S.W.3d —, 2010 Ark. LEXIS 379 (June 24, 2010).

Substantial evidence supported defendant's convictions for commercial burglary, criminal mischief, and breaking and entering because the testimony of defendant's accomplice, who was defendant's son, was sufficiently corroborated, as required by § 16-89-111(e)(1), by an officer's testimony as to the items he found in defendant's truck, matching the description of items stolen from a convenience store. The accomplice admitted that he and defendant entered the store by using a cable to pull open the front doors and that he and defendant used bolt cutters and a pry bar to break into gaming machines, and these items, along with packages of cigarettes stolen from the store, were found by police officers in defendant's truck. *Dunlap v. State*, 2010 Ark. App. 582, — S.W.3d — (2010).

Defendant's convictions for breaking or entering, in violation of subdivision (1) of this section, and theft of property, in violation of § 5-36-103(a)(1), were supported by the evidence because defendant's unlawful presence near a storage shed, flight from the victim, and association with persons involved in the crimes suggested that defendant jointly participated in the crimes under § 5-2-402(a)(2). *Goforth v. State*, 2010 Ark. App. 735, — S.W.3d — (2010).

Defendant's conviction for breaking or entering, in violation of subdivision (a)(1) of this section, was proper because defendant was caught red-handed in the victim's house with the contents of the house

thrown around and a broken window in the back of the house; defendant ran away from the scene at the first opportunity. It did not matter whether the house was occupiable. *Smith v. State*, 2011 Ark. App. 162, — S.W.3d — (2011).

Trial court did not err in denying defendant's motion for a directed verdict during a trial for breaking or entering, in violation of subdivision (a)(1) of this section, because there was sufficient evidence to support the conviction; an officer observed a car with a broken window, and found defendant in the vehicle behind the steering wheel with a screwdriver in defendant's hand. *Pruitt v. State*, 2011 Ark. App. 754, — S.W.3d — (2011).

#### **Proof.**

Evidence was sufficient to convict defendant of breaking an entering automobiles when a victim described defendant and his vehicle and the police stopped defendant's vehicle while it was still within sight of the victim, there was no one else in the car, and the stolen property described by the victims was in defendant's car. *Davis v. State*, 2011 Ark. App. 561, — S.W.3d — (2011).

#### **Vehicle.**

Breaking or entering a vehicle for purposes of committing a theft under this section is not a violent felony for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C.S. § 924(e); thus, the ACCA was improperly applied to defendant's sentence for violation of 18 U.S.C.S. § 922(g), (j), and his sentence was vacated. *United States v. Livingston*, 442 F.3d 1082 (8th Cir. 2006).

### **5-39-203. Criminal trespass.**

(a) A person commits criminal trespass if he or she purposely enters or remains unlawfully in or upon:

- (1) A vehicle; or
- (2) The premises of another person.

(b) Criminal trespass is a:

- (1) Class B misdemeanor if:

(A) The vehicle or premises involved is an occupiable structure; or

(B) The conduct involves the removal of a posted sign, a fence, or a portion of a fence as defined in § 2-39-102; or

- (2) Class C misdemeanor if otherwise committed.

(c) An individual aggrieved by a violation of this section is granted a private cause of action against the person who violated this section and is entitled to recover:



- (1) Actual damages caused by the violation;
- (2) Reasonable attorney's fees; and
- (3) Punitive damages.

**History.** Acts 1975, No. 280, § 2004; A.S.A. 1947, § 41-2004; Acts 2013, No. 960, § 2.

**Amendments.** The 2013 amendment added (b)(1)(B) and (c).

## RESEARCH REFERENCES

**Ark. L. Notes.** Brill, *Arkansas Law of Damages*, Fifth Edition, Chapter 30: Real Property, 2004 Arkansas L. Notes 9.

## CASE NOTES

### Revocation.

When defendant was placed on two years' probation on his plea of guilty to possession of cocaine, one of the conditions was that he not violate any state law; the state petitioned to revoke his suspended imposition of sentence, alleging that he violated his conditions by committing bur-

glary and failed to satisfy court costs. Defendant's plea of guilty to criminal trespass in violation of subdivision (a)(2) of this section alone was sufficient to support the finding that he violated his probation. *Johnson v. State*, 2009 Ark. App. 527, 334 S.W.3d 419 (2009).

## 5-39-204. Aggravated residential burglary.

(a) A person commits aggravated residential burglary if he or she commits residential burglary as defined in § 5-39-201 of a residential occupiable structure occupied by any person, and he or she:

- (1) Is armed with a deadly weapon or represents by word or conduct that he or she is armed with a deadly weapon; or
- (2) Inflicts or attempts to inflict death or serious physical injury upon another person.

(b) Aggravated residential burglary is a Class Y felony.

**History.** Acts 2007, No. 1608, § 1.

## CASE NOTES

### ANALYSIS

Conspiracy.  
Sufficient Evidence.

### Conspiracy.

Defendant committed an overt act in furtherance of a conspiracy to commit kidnapping, aggravated robbery, theft of property, and aggravated residential burglary because he took another person to his residence and showed the person the inside of the premises, discussed how to break in the residence and how to subdue his wife, and identified the property to be

taken from the residence. *Winkler v. State*, 2012 Ark. App. 704, — S.W.3d —, 2012 Ark. App. LEXIS 825 (Dec. 12, 2012).

### Sufficient Evidence.

Evidence was more than sufficient to prove that defendant did not have permission to be in the residence, because the victim ran from his residence yelling that he needed help and asking someone to call the police. *Lewis v. State*, 2009 Ark. App. 504, 323 S.W.3d 640 (2009).

Defendant's convictions for two counts of aggravated burglary were proper under § 5-39-201(a) and subsection (a) of this

section because defendant's argument that there was no direct proof on the record of defendant holding a gun was without merit since substantial circumstantial evidence supported a finding of guilt, either as a principal or an accomplice. A neighbor verified that one of the intruders had a gun, the victim told the officers that the intruders hid their guns in the closet, where two guns were found, and both intruders were charged in the same instrument, implicating accomplice liability; that provided substantial evidence supporting the finding that the intruders at minimum represented by word or conduct that they were armed as a threat. *Hinton v. State*, 2010 Ark. App. 341, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 516 (June 2, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 399 (Aug. 6, 2010).

Circumstantial evidence was sufficient to support defendant's aggravated burglary conviction under subdivisions (a)(1) and (a)(2) of this section because the evidence showed that the victim shot an intruder as the victim leaned over a railing in the house sometime after 2:30 a.m., that defendant appeared at a hospital with a gunshot wound a short time later, that the bullet's trajectory as it traveled through defendant's body was consistent with the shot having been fired from above, that a .45-caliber slug removed from defendant's body and a spent shell casing found in the victim's handgun were the same caliber, that a slug removed from the burglary location was fired from a gun recovered from a vehicle of defendant's girlfriend, and that defendant's shoe prints matched those found on the townhouse's front door. *Thornton v. State*, 2010 Ark. App. 569, — S.W.3d — (2010).

Defendant's convictions for aggravated residential burglary in violation of subsection (a) of this section and aggravated robbery in violation of § 5-12-103(a) were appropriate because the state provided

sufficient evidence to corroborate his accomplices' testimony; even eliminating the accomplice testimony, the remaining evidence presented independently established the crimes and tended to connect defendant with their commission. In part, witnesses testified about defendant being with the accomplices on the day of the crimes and the state also presented a witness's testimony that defendant had sold him the three shotguns that were identified as being the ones stolen from the victim. *Tucker v. State*, 2011 Ark. 144, 381 S.W.3d 1 (2011), dismissed, *Tucker v. Hobbs*, — F. Supp. 2d —, 2012 U.S. Dist. LEXIS 129748 (E.D. Ark. Sept. 12, 2012).

Evidence that defendant entered the victim's locked trailer in the early morning hours while the victim was asleep and struggled with and stabbed the victim supported defendant's conviction for aggravated residential burglary. *Holt v. State*, 2011 Ark. 391, 384 S.W.3d 498 (2011).

Appellant's convictions for aggravated robbery, aggravated residential burglary, and misdemeanor fleeing were affirmed where a witness testified that appellant pointed a sawed-off shotgun at his head, which would necessarily constitute proof that appellant was "armed with a deadly weapon"; the testimony of one eyewitness was sufficient to sustain a conviction. *Riley v. State*, 2011 Ark. App. 511, 385 S.W.3d 355 (2011).

Evidence was sufficient to sustain convictions for aggravated robbery and aggravated residential burglary because the victim testified that when defendant came into her house, he told her to give him her money and that he was going to kill her. Defendant had a paper bag over his right hand and his right hand was pointing directly at her stomach; she believed that there was a gun in the paper bag. *Dobbins v. State*, 2013 Ark. App. 269, — S.W.3d — (2013).

**Cited:** *Stephens v. State*, 2010 Ark. App. 363, — S.W.3d — (Apr. 28, 2010).

## 5-39-214. Unauthorized entry of a school bus — Posting of warning on a school bus.

### RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2005 Arkansas General As-

sembly, Education Law, 28 U. Ark. Little Rock L. Rev. 347.



**SUBCHAPTER 3 — OFFENSES INVOLVING POSTED AND ENCLOSED LAND**

## SECTION.

5-39-302. [Repealed.]

**5-39-302. [Repealed.]**

**Publisher's Notes.** This section, unlawful entry upon enclosed grazing land, was repealed by Acts 2013, No. 1348, § 4. The section was derived from Acts 1969,

No. 338, §§ 1, 3; 1975, No. 197, § 4; A.S.A. 1947, §§ 41-2055, 41-2057; Acts 1999, No. 1029, § 2; 2005, No. 1994, § 49.

**SUBCHAPTER 4 — OFFENSES INVOLVING CEMETERY OR GRAVE MARKERS**

## SECTION.

5-39-401. Destruction or removal of a cemetery or grave marker.

**5-39-401. Destruction or removal of a cemetery or grave marker.**

(a) It is unlawful for any person, corporation, company, or other entity to destroy or carry away any cemetery marker or grave marker.

(b) Destruction or removal of a cemetery marker or grave marker is a Class C felony.

**History.** Acts 1997, No. 1244, § 1; 2005, No. 1994, § 327; 2005, No. 2232, § 3; 2007, No. 265, § 1; 2009, No. 748, § 24.

**Amendments.** The 2009 amendment inserted "marker" following "cemetery" in (b).

**CHAPTER 40**  
**PUBLIC LANDS**

## SECTION.

5-40-103. Removal of improvements to

land after forfeiture to state.

**5-40-103. Removal of improvements to land after forfeiture to state.**

(a) If any land or town or city lot has been forfeited to the State of Arkansas for the nonpayment of taxes and the title of the state to the land or town or city lot has been confirmed, it is unlawful after the date of the confirmation decree for the former owner or any other person to sell, buy, damage, or remove from the land or town or city lot any building, fence, or other improvement on the land or town or city lot.

(b) Upon conviction, any person violating this section is guilty of a Class B misdemeanor and is liable to the State of Arkansas for three (3) times the amount of the value of the building, fence, or other improvement that is sold, bought, damaged, or removed in violation of this section.

**History.** Acts 1943, No. 224, §§ 1, 2;

A.S.A. 1947, §§ 10-308, 10-309; Acts 2005,  
No. 1994, § 380; 2007, No. 827, § 43.

## **CHAPTER 41**

### **COMPUTER-RELATED CRIMES**

SUBCHAPTER.

#### **2. COMPUTER CRIMES.**

### **SUBCHAPTER 1 — COMPUTER-RELATED CRIME**

#### **5-41-102. Definitions.**

#### **RESEARCH REFERENCES**

**Ark. L. Notes.** Snow, The Law of Computer Trespass: Cyber Security or Virtual Entrapment?, 2007 Ark. L. Notes 109.

#### **5-41-103. Computer fraud.**

#### **CASE NOTES**

##### **Jurisdiction.**

Arkansas trial court had jurisdiction over defendant, a Georgia resident, during his trial for theft of property and computer fraud where defendant caused the victim, an Arkansas resident, to access

her computer by virtue of his email correspondence for the purpose of obtaining money with a false or fraudulent intent, representation, or promise. *Powell v. State*, 97 Ark. App. 239, 246 S.W.3d 891 (2007).

#### **5-41-104. Computer trespass.**

#### **RESEARCH REFERENCES**

**Ark. L. Notes.** Snow, The Law of Computer Trespass: Cyber Security or Virtual Entrapment?, 2007 Ark. L. Notes 109.

### **SUBCHAPTER 2 — COMPUTER CRIMES**

SECTION.

5-41-202. Unlawful act regarding a computer.

#### **5-41-201. Definitions.**

#### **RESEARCH REFERENCES**

**Ark. L. Notes.** Snow, The Law of Computer Trespass: Cyber Security or Virtual Entrapment?, 2007 Ark. L. Notes 109.



**5-41-202. Unlawful act regarding a computer.**

(a) A person commits an unlawful act regarding a computer if the person knowingly and without authorization:

(1) Modifies, damages, destroys, discloses, uses, transfers, conceals, takes, retains possession of, copies, obtains or attempts to obtain access to, permits access to or causes to be accessed, or enters data or a program that exists inside or outside a computer, system, or network;

(2) Modifies, destroys, uses, takes, damages, transfers, conceals, copies, retains possession of, obtains or attempts to obtain access to, permits access to or causes to be accessed, equipment or supplies that are used or intended to be used in a computer, system, or network;

(3) Destroys, damages, takes, alters, transfers, discloses, conceals, copies, uses, retains possession of, obtains or attempts to obtain access to, permits access to or causes to be accessed, a computer, system, or network;

(4) Obtains and discloses, publishes, transfers, or uses a device used to access a computer, system, network, or data; or

(5) Introduces, causes to be introduced, or attempts to introduce a computer contaminant into a computer, system, or network.

(b) An unlawful act regarding a computer is a:

(1) Class A misdemeanor; or

(2) Class C felony if the act:

(A) Was committed to devise or execute a scheme to defraud or illegally obtain property;

(B) Caused damage in excess of five hundred dollars (\$500); or

(C) Caused an interruption or impairment of a public service, including, without limitation, a:

(i) Governmental operation;

(ii) System of public communication or transportation; or

(iii) Supply of water, gas, or electricity.

**History.** Acts 2001, No. 1496, § 2;  
2007, No. 827, § 44.













